Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In the Supreme Court of the United States

KEITH SMITH, Warden,

Petitioner,

v.

ROBERT S. VASQUEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a state court act "contrary to . . . clearly established Federal law" under 28 U.S.C. § 2254(d)(1) when it cites the appropriate standard of review for a specific issue in its opinion but later uses imprecise shorthand terms in referring to that standard?

2. Did the Sixth Circuit err in granting the habeas writ on Respondent's ineffective assistance of counsel claim notwithstanding the state courts' contrary determination?

LIST OF PARTIES

The Petitioner is Keith Smith, the Warden of the Mansfield Correctional Institution. Smith is substituted for his predecessor, Margaret Bradshaw. See Fed. R. Civ. P. 25(d).

The Respondent is Robert S. Vasquez, an inmate at the Mansfield Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Keith Smith, the Warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Vasquez v. Bradshaw*, 345 F. App'x 104 (6th Cir. 2009), is reproduced at App. 3a. The Sixth Circuit's order denying the State's petition for rehearing and suggestion for rehearing en banc is reproduced at App. 1a. The Memorandum of Opinion and Order of the United States District Court for the Northern District of Ohio, *Vasquez v. Bradshaw*, 522 F. Supp. 2d 900 (N.D. Ohio 2007), is reproduced at App. 66a. The state court of appeals' decision affirming the trial court's denial of Vasquez's petition for post-conviction relief and motion for leave to file a motion for new trial instanter, *State v. Vasquez*, 2004-Ohio-53 (Ohio Ct. App. 2004), is reproduced at App. 129a. The trial court's findings of fact and conclusions of law on these actions are reproduced at App. 149a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's rehearing petition on January 28, 2010. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This case presents an issue under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1214, on which this Court has twice spoken directly and clearly: whether a state court decision receives AEDPA deference when the state court initially recites the correct standard for ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), but then later uses an imprecise shorthand to refer to that standard. In both *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam), and *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), the Court held that AEDPA deference applies to such decisions.

Despite the plain guidance of *Jackson* and *Visciotti*—and with barely an effort to distinguish those decisions—the Sixth Circuit here held the opposite. It declined to afford AEDPA deference to the state appeals court decision, even though the court correctly stated the *Strickland* test, because it later made imprecise shorthand references to that test. Then, with AEDPA (and the reasonable Ohio court decision) out of the way, the Sixth Circuit held that Respondent Robert S. Vasquez's trial counsel afforded constitutionally ineffective assistance.

The Sixth Circuit's decision warrants review and summary reversal on two levels. First, on the question of AEDPA deference, it flouts this Court's settled precedent and upends the presumption that state courts know and follow the law. The decision leaves the Sixth Circuit standing alone among the circuits in second-guessing state court decisions that recite the correct legal standard. Second, in its de novo application of *Strickland*, the Sixth Circuit used

hindsight to second-guess trial counsel's reasonable strategy and held that Vasquez was prejudiced by a lack of cumulative evidence.

STATEMENT OF THE CASE

A. Vasquez raped a nine-year-old girl in the basement of his sister-in-law's house.

Vasquez is serving a life sentence for the rape and related kidnapping of a nine-year-old girl. *State v. Vasquez*, No. 79319, 2001 Ohio App. Lexis 4910, *4 (Ohio Ct. App. Nov. 1, 2001). The crime featured an interrelated cast of players. At the time of the assault, Vasquez and his wife, Karra Vasquez, were living with their two infant children in the basement of the house where Don Shaffer and his fiancée, Becky Egbertson (now known as Becky Shaffer), lived. *Id.* at *2. Karra Vasquez—Respondent's wife—is Becky Shaffer's sister. *Id.* The victim's father is Don Shaffer's best friend and a police officer for the City of Cleveland. *Id.*

On the evening of July 23, 2000, the victim ("A.L.") and her father went to the Shaffers' house to eat and socialize. *Id.* They arrived late, after Don and Becky had gone to bed, but while Vasquez and Karra were still awake. *Id.* After eating, A.L.'s father and Karra went outside to talk. *Id.* Vasquez told A.L. to go with him to the basement to watch television with him and his children on a bunk bed. *Id.*

In the basement, Vasquez's children were on the bottom bunk, and A.L. climbed onto the top bunk. *Id.* at *2–3. Vasquez joined A.L. on the top bunk and removed the ladder. *Id.* at *3. He then pushed A.L. down, held his hand over her mouth,

pulled down her pants and underwear, and licked her vaginal area for several minutes. *Id.* He stopped only when A.L.'s father called for her from the top of the stairs. *Id.* A.L. then got dressed and left the house with her father. *Id.*

A.L. did not mention the assault to anyone at the time. *Id.* Several weeks later, her father dropped her off at the Shaffers' house for babysitting. *Id.* When Vasquez asked A.L. to accompany him to the basement on that day, she refused, and a short time later told Don Shaffer about the earlier assault. *Id.* Don then told A.L.'s father, who called his partner to help him investigate the matter. *Id.* at *4. They discussed the event with A.L. and eventually called 911. *Id.* A.L. rode in an ambulance to the hospital, where she met with a social worker and received a physical examination. *Id.*

B. A state court jury convicted Vasquez, and the trial court sentenced him to life in prison; his conviction was affirmed on direct appeal.

Vasquez was indicted on two counts—rape of a child under the age of thirteen and kidnapping. *Vasquez*, 2001 Ohio App. Lexis 4910, at *1. The State offered several witnesses at trial, including A.L., her father, a social worker who interviewed the victim and investigated the case for the local children services department, two police officers who also investigated the matter, and Don Shaffer. Sixth Circuit Joint Appendix ("J.A.") 635–891. Given that there were no witnesses to the act itself beyond Vasquez's infant children, Vasquez's attorney, Don Butler, introduced no evidence and called no defense witnesses. J.A. 901. Instead, he used his cross-

examination of the State's witnesses to cast doubt on the State's theory of the case and on the victim's honesty.

The jury found Vasquez guilty on both counts. *Vasquez*, 2001 Ohio App. Lexis 4910, at *4. The trial court then sentenced him to life imprisonment for the rape charge and nine years imprisonment for the kidnapping charge, with the two sentences to run concurrently. *Id.*

Vasquez raised three issues—including ineffective assistance of counsel—on a delayed direct appeal, but the state appeals court affirmed his conviction on all counts. *Id.* at *5–12. Vasquez did not appeal this decision to the Ohio Supreme Court.

C. The Ohio courts denied post-conviction relief.

While his direct appeal was pending, Vasquez sought post-conviction relief in the state trial court. J.A. 193. (In the same court, he also sought leave to file a motion for new trial; his claims there were substantially similar to those in his post-conviction petition. J.A. 70.) Vasquez argued that Butler failed to investigate certain witnesses with favorable information and to present their testimony at trial. App. 149a–150a. He also argued that Butler failed to examine fully two notations on the run sheet from the Emergency Medical Service ("EMS") vehicle that transported A.L. to the hospital after she reported the abuse: "pt. st. 'he put it in' her" and "pt. st. she took a shower later that day." App. 150a & 157a–158a. Vasquez claimed generally that these witnesses and the EMS run sheet would have cast further doubt on A.L.'s capacity for truthfulness.

The state trial court held a three-day hearing on both the motion and the petition. App. 150a; J.A. 1010–1450. Vasquez called various witnesses, only three of whom are relevant to Vasquez's current habeas claim: Becky Shaffer; a friend of the victim's family named Tammy Salopek; and Salopek's daughter, Ashley Snyder, who was friends with the victim. App. 23a–24a. Butler also testified. J.A. 1088–1146.

After hearing this evidence, the trial court entered various findings of fact and conclusions of law supporting its holding that Butler did not render ineffective assistance. Among other things, the court noted that the witnesses identified were largely uncooperative at the time of trial and that Butler did not have a continuing duty to seek out witnesses who refused to assist the defense. App. 175a–176a. The trial court also found that Butler exercised proper professional discretion in not calling Becky Shaffer for various reasons: her husband was a State witness; she and Karra Vasquez's mother had told Butler that no family members would cooperate with the defense; and her testimony did not discredit the victim's account of the events. App. 176a. And the court found that the EMS run sheet was actually consistent with the victim's trial testimony that the "it" was Vasquez's tongue, and that the notation that she took a shower did not contradict her testimony. App. 177a–178a.

The state appeals court affirmed. After correctly identifying the *Strickland* standard of review for claims of ineffective assistance of counsel, the court reviewed all of the trial court's findings of fact and conclusions of law. App. 134a–140a. The

court noted that the testimony of the various witnesses did "not demonstrate [Vasquez's] counsel was ineffective" or "that the outcome of his trial would have been different had they been witnesses during his trial." App. 141a. Indeed, the court noted that "none of the defendant's witnesses offered any testimony to support defendant's theory of innocence." *Id.* The court, like the trial court, also held that there was "no evidence that [Vasquez's] counsel failed to fully defend [Vasquez] at trial." *Id.*

The Ohio Supreme Court declined to accept Vasquez's appeal. *State v. Vasquez*, 809 N.E.2d 1158 (Ohio 2004).

D. The federal district court granted Vasquez's petition for habeas corpus relief.

Vasquez then sought federal habeas relief, again claiming ineffective assistance of trial counsel. App. 66a. The district court declined to defer to the state post-conviction court's findings and instead made its own findings of fact regarding all of the witnesses that Vasquez identified. App. 74a. The court also determined that the state appeals court unreasonably applied the *Strickland* standard. App. 105a–106a. Then, based on its independent review of the facts, the district court held that Butler afforded ineffective assistance by failing to (1) meet sufficiently with Vasquez before trial and (2) conduct an adequate investigation. App. 104a–128a.

E. A divided Sixth Circuit panel affirmed the district court's grant of the writ.

The Sixth Circuit affirmed. App. 4a. The court first declined to defer to the state courts' legal analysis because it determined that the Ohio courts erred in defining and applying the *Strickland* standard. App. 14a–19a. The Sixth Circuit noted that the state trial court identified the correct two-part ineffective-assistance test, but that it then erroneously said that prejudice occurs only when "'the result of petitioner's trial or legal proceeding *would have been different* had defense counsel provided proper representation.'" App. 15a (emphasis added by the Sixth Circuit).

The Sixth Circuit explained that the trial court's "would have been different" language departs from the correct formulation of *Strickland*'s second step, which defines prejudice as a "*reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." App. 14a–15a (quoting *Strickland*, 466 U.S. at 694) (emphasis added by the Sixth Circuit). The Sixth Circuit added that the Ohio appeals court repeated the error by reciting the correct *Strickland* test but then asking whether the outcome of Vasquez's trial "'*would have been different*'" without counsel's errors. App. 15a (emphasis added by the Sixth Circuit). Because it found that these state court recitations ran "contrary to clearly established federal law," the Sixth Circuit engaged in a de novo review of Vasquez's ineffective assistance claims. App. 19a.

The Sixth Circuit also held that the trial court unreasonably determined the facts regarding the

three witnesses discussed above and the EMS run sheet. App. 22a–23a. It determined that the trial court improperly blended legal conclusions with the facts regarding whether Butler should have further inquired into Becky Shaffer's information, and found that a deeper investigation would have led to the information presented by Tammy Salopek and Ashley Snyder. App. 22a. The court also held that the trial court improperly elevated one interpretation of the information in the EMS run sheet over another instead of finding that the jury should have been able to hear both interpretations. App. 22a–23a. The court accordingly engaged in a de novo review of this evidence. *Id.*

Taking all of these considerations into account, the Sixth Circuit held that Vasquez received ineffective assistance because Butler conducted a deficient investigation and that, had he performed an adequate one, he could have cast serious doubt on the victim's capacity for truthfulness. App. 23a–38a.

In dissent, Judge Griffin noted that this Court's decisions *Visciotti* and *Jackson* foreclosed the majority's decision to withhold AEDPA deference on the Ohio courts' *Strickland* analysis. App. 42a–52a. Judge Griffin would have applied AEDPA deference to hold that the state courts reasonably applied *Strickland* to the facts of this case. App. 52a–65a.

The Sixth Circuit denied the Warden's request for panel rehearing or rehearing en banc. App. 1a–2a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision rests on the badly misguided premise that the Ohio appeals court's decision denying Vasquez's ineffective assistance of counsel claim is not entitled to AEDPA deference. That premise is wrong because this Court has made clear that state court decisions are entitled to deference when they recite the full, correct standard and thereafter use shorthand in referring to it, even if the shorthand is imprecise. Then, building on its mistaken premise, the Sixth Circuit conducted a de novo assessment of Vasquez's claim that disregarded the deference inherent in *Strickland*'s performance prong and found prejudice where none could possibly exist.

The decision warrants this Court's attention because it defies two settled precedents—themselves both summary reversals of outlying lower court decisions—and distorts the *Strickland* analysis to invalidate a conviction that the Ohio courts had reasonably upheld.

A. The Sixth Circuit defied this Court's clear precedents in declining to afford AEDPA deference to the Ohio appeals court's denial of Vasquez's *Strickland* claim.

The Sixth Circuit first erred when it refused to afford AEDPA deference to the Ohio appeals court's decision even though the state court correctly recited the *Strickland* standard. The resulting decision is an outlier among the circuits in withholding AEDPA deference from state court decisions that invoke the correct legal standard.

In reviewing Vasquez's ineffective-assistance claim on state post-conviction review, the Ohio court of appeals correctly recited the two-part *Strickland* test: "A defendant must demonstrate that trial counsel's performance fell below the objective standard of reasonable competence under the circumstances and that there exists a reasonable probability that, but for such deficiency, the outcome of the trial would have been different." App. 134a. Rather than citing *Strickland* itself, the Ohio court cited *State v. Bradley*, 538 N.E.2d 373 (Ohio 1989), an Ohio Supreme Court decision that adopts the *Strickland* standard and discusses it at length, *id.* at 379–81.

After invoking the correct test, the Ohio appeals court extensively examined the evidence and findings from the trial court's three-day hearing on Vasquez's ineffective-assistance claim. App. 136a. The state appeals court also recited the trial court's conclusions that Butler did not violate a professional duty guaranteed by the Sixth Amendment because his performance was not ineffective. App. 136a–140a. The appeals court then itself concluded that Vasquez had not demonstrated that "the outcome of his trial would have been different" had the witnesses called in the post-conviction hearing testified during his trial. App. 141a. "On the contrary, the record shows that none of defendant's witnesses offered any testimony to support defendant's theory of innocence." *Id.* Thus, the court said, "none of . . . the witnesses who testified at the post-conviction hearing . . . would have changed the outcome of his trial." *Id.*

Vasquez argues that the Ohio appeals court botched *Strickland*'s prejudice prong because it asked whether the trial outcome "would have been different" or "would have changed" with additional witnesses, rather than whether a "reasonable probability" exists that the trial would have ended differently. But settled precedent establishes that the Ohio appeals court's use of imprecise shorthand references after reciting the correct standard is not "contrary to . . . clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1).

To begin with, *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), is on all fours with this case. There, Visciotti claimed ineffective assistance of counsel, and the California Supreme Court "began its analysis of the prejudice inquiry by setting forth the 'reasonable probability' criterion, with a citation of the relevant passage in *Strickland*." *Id.* at 22. The Ninth Circuit concluded, however, that the California court improperly held Visciotti to a higher prejudice standard because the state court later "used the term 'probable' without the modifier 'reasonably.'" *Id.* at 23. This Court summarily reversed, explaining that the California Supreme Court had "painstakingly describe[d] the *Strickland* standard," and that "[i]ts occasional shorthand reference to that standard by the use of the term 'probable' without the modifier may perhaps be imprecise," but could not "be considered a repudiation of the standard." *Id.* at 23–24. In fact, the Court noted, its own opinions on occasion have used similar shorthand in referring to the *Strickland* standard. *Id.* at 24 (citing examples).

The Court then explained that the Ninth Circuit's "readiness to attribute error [by the California Supreme Court] is inconsistent with the presumption that state courts know and follow the law." *Id.* (citations omitted). "It is also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings,' which demands that state court decisions be given the benefit of the doubt." *Id.* (citations omitted).

Two years after deciding *Visciotti*, this Court issued another summary reversal that is likewise on all fours with this case. In *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam), the question again was whether a state court had altered the *Strickland* prejudice prong. A Tennessee court "began by reciting the correct *Strickland* standard," but "[t]he Sixth Circuit nevertheless concluded that the state court had actually applied a preponderance standard, based on three subsequent passages from its opinion." *Id.* at 654. In reversing, this Court explained that none of the three disputed passages in the Tennessee court opinion improperly changed the *Strickland* analysis. *Id.* at 654–55. Instead, this Court faulted the Sixth Circuit's "'[r]eadiness to attribute error" and reiterated that AEDPA "requires that 'state-court decisions be given the benefit of the doubt.'" *Id.* at 655 (quoting *Visciotti*, 537 U.S. at 24).

Until the decision below, the lower courts—including the Sixth Circuit—had shown little difficulty following *Visciotti* and *Jackson*. For instance, in *Urban v. Ohio Adult Parole Authority*, 116 F. App'x 617, 627 (6th Cir. 2004), the habeas petitioner objected that an Ohio appeals court had imposed a higher measure of proof under *Strickland*

by requiring him to show that, but for counsel's errors, the "outcome probably would have been different." The Sixth Circuit rejected that argument on the authority of *Visciotti* and *Jackson*. *Id.* Similarly, the Eighth Circuit relied on *Visciotti* to reject the government's argument that the district court applied a too-lenient standard in granting the habeas writ when it once referred to a "reasonable *possibility*" (rather than probability) that the outcome would have differed. *White v. Roper*, 416 F.3d 728, 732 (8th Cir. 2005) (emphasis in original). The Eighth Circuit noted that the district court had elsewhere stated the correct standard, and it therefore concluded that the lower court's isolated use of "the wrong word" did not amount to a "repudiation" of *Strickland*. *Id.* at 732–33.

The Sixth Circuit gave no sound reason for departing from these precedents and holding that the Ohio appeals court's decision was "contrary to" this Court's precedents.[1] Although Judge Griffin's dissent carefully explained that *Visciotti* and *Jackson* control this case, App. 44a–52a, the majority

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[1] The Sixth Circuit suggested in a footnote that the Ohio trial court opinion, as opposed to the state appeals court decision, might be the decision to look to for purposes of AEDPA review, because the state appeals court had applied an abuse of discretion standard rather than a de novo *Strickland* analysis. App. 16a–17a n.1. This footnote is wrong for the reasons explained in Judge Griffin's dissent, App. 39a–42a, but it is also irrelevant. The majority did "not find it necessary to resolve" the issue because it determined that the Ohio trial and appeals courts had made the same mistake; both decisions "applied law contrary to the *Strickland* standard by asking whether the outcome would have been different." App. 16a n.1. The Sixth Circuit's footnote on this point is therefore sheer dicta that does not affect the analysis here.

distinguished those cases on the ground that the Ohio appeals court's "incorrect words cannot be regarded as anodyne 'shorthand,' because they actually describe and apply a different standard." App. 18a–19a.

But the state court did not describe and apply a different standard. It described one standard—*Strickland*—correctly, and then it reasonably applied that standard to the facts of this case. App. 134a. To be sure, its later references to the prejudice prong omitted the "reasonable probability" language. But having shown that it was aware of the correct law, the court did not need continually to incant magic words to receive deference. On the contrary, it is entitled to a presumption that it followed the law. *Visciotti*, 537 U.S. at 24.

More to the point, the content of the Ohio appeals court's analysis demonstrates that it was applying the correct standard. In assessing prejudice, the court observed that "none of defendant's witnesses offered any testimony to support defendant's theory of innocence," and "[n]one of their testimony challenges the victim's account of the events leading to defendant's convictions." App. 141a. This is a run-of-the-mill *Strickland* prejudice analysis. It cannot fairly be said that the state court in this passage "appl[ied] a different standard" from *Strickland*. App. 19a.

But even if the Sixth Circuit is correct (and it is not), at most it establishes that the Ohio appeals court erred on step *two* of the *Strickland* test—the prejudice inquiry. The Sixth Circuit did not suggest that the Ohio appeals court erred in describing or applying *Strickland*'s *first* step—the deficient

performance prong. Nor would such a suggestion be sound. The state appeals court correctly identified this inquiry: "A defendant must demonstrate that trial counsel's performance fell below the objective standard of reasonable competence under the circumstances . . . ." App. 134a. And it properly applied this standard, stating that the absence of certain witnesses did "not demonstrate [Vasquez's] counsel was ineffective," and "find[ing] no evidence that his counsel failed to fully defend defendant at trial." App. 141a.

Because the Ohio appeals court correctly described and applied *Strickland*'s first step, it is entitled to AEDPA deference on that prong, even if deference is withheld on the prejudice prong. The Fourth Circuit took this very approach in *Moody v. Polk*, 408 F.3d 141, 146–47 (4th Cir. 2005). In that case, the state court correctly identified the first step of *Strickland*, so the Fourth Circuit reviewed that portion of its decision "under the deferential AEDPA standard." *Id.* at 147. "Because the state court applied the wrong standard to evaluate prejudice," however, the Fourth Circuit "d[id] not defer to its analysis of that prong but instead review[ed] it *de novo*." *Id.*; see also *Gray v. Branker*, 529 F.3d 220, 228–38 (4th Cir. 2008) (finding that state court decision was "contrary to" step two, but not step one, of *Strickland*).

Vasquez's *Strickland* claim fails simply because the state court reasonably found that Butler's performance was not deficient. See *Strickland*, 466 U.S. at 697. There is no need to reach the prejudice prong, let alone to conduct a de novo prejudice inquiry. But on either prong of the

analysis—and with or without AEDPA deference—Vasquez's ineffective-assistance claim fails, as the below discussion demonstrates.

B. The state courts reasonably concluded that Vasquez did not receive ineffective assistance of counsel.

The Sixth Circuit's decision to grant Vasquez habeas relief hinged entirely on its ability to wriggle free of the constraints of AEDPA, and it falls apart once the freedom to engage in a de novo review of the cold record is removed. The state trial court reasonably determined the relevant facts at issue, and the state appeals court reasonably applied *Strickland* to those facts in finding no ineffective assistance of counsel here.

1. Vasquez's ineffective-assistance claim turns on the potential testimony of three witnesses and one piece of evidence.

The Sixth Circuit relied on the potential testimony of three witnesses (Becky Shaffer, Tammy Salopek, and Ashley Snyder) and one piece of evidence (the EMS run sheet) to support its conclusion that Vasquez's counsel was ineffective. The trial court made several findings of fact about Vasquez's arguments in this regard, and those findings are entitled to deference as long as they are not unreasonable in view of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d)(2). The potential testimony and evidence is as follows.

Becky Shaffer. The trial court reviewed the various points to which Becky Shaffer would have testified had she been called. Shaffer stated that

she was in bed on the night in question and did not directly witness the assault. App. 165a. She rode with A.L. and A.L.'s father in the ambulance to the hospital on the night the rape was reported. *Id.* She observed that A.L. was not crying, and that A.L. had asked if she was going to be on television. *Id.* Shaffer stated that A.L. was laughing in the ambulance, but admitted that the laughter was prompted by the medical attendants' joking with A.L. App. 165a–166a. Shaffer noted that A.L. craved attention. App. 165a. She also observed that, at the hospital, A.L.'s father prompted A.L. to tell officials what had happened, and about a light in the basement where the assault occurred. App. 165a–166a. Shaffer also testified that she took her own son to the hospital to be examined because of concerns that Vasquez may have sexually abused him as well. *Id.*

The trial court found that Butler may have decided not to call Shaffer because her husband was a State's witness. App. 176a. The trial court also noted that Shaffer did not give a statement to the police regarding the incident. App. 166a. The trial court further found that Shaffer (Vasquez's sister-in-law) and the rest of Vasquez's family had, in Vasquez's own words, abandoned him when he was in prison. App. 160a & 175a–176a (noting that counsel was told that no one in the family would talk with him, and that the witnesses corroborated this fact); J.A. 1372 ("Q: Did you feel like you had been abandoned by your family? Vasquez: I guess you could probably call it abandonment, yes."). The trial court characterized Shaffer and other family members as having "refused to cooperate." App. 175a.

Tammy Salopek and Ashley Snyder. The trial court observed that Butler only would have discovered Tammy Salopek and Ashley Snyder if he had spoken to Becky Shaffer, and thus he can only be responsible for the absence of Salopek and Snyder as witnesses if his decision not to investigate Becky Shaffer was unreasonable. App. 175a. Salopek, a friend of A.L.'s father, would have provided additional testimony that A.L. lied on a few occasions, that she exaggerates and is not extremely trustworthy, and that she is melodramatic and can manipulate her father. App. 167a–168a. Snyder, Salopek's daughter and a friend of A.L.'s, also would have testified that A.L. lies and that she did not appear upset when Snyder saw her over a month after the assault. App. 169a.

The Sixth Circuit also noted that Snyder would have contributed to a defense theory that "A.L. had fabricated the story because Ashley Snyder had, earlier in the summer of 2000, been the victim of sexual molestation and had shared her story with A.L." App. 10a & 33a. The trial court limited its findings of facts regarding Snyder to those set forth above, though, and ruled that Snyder's testimony regarding other sexual matters was inadmissible on the basis that Vasquez failed to provide a proper foundation to support it. App. 169a. Further, the state appeals court did not mention the other sexual matters in its discussion of Snyder. App. 139a. The Sixth Circuit never disputed this foundational flaw; it just ignored it. Its reliance on those facts was therefore improper under § 2254(d)(2), and they should not enter into the analysis here.

EMS Run Sheet. The trial court found that Vasquez's counsel had knowledge of the EMS run sheet, which included notations that A.L. stated that "he put it in her" and that "she took a shower later that day." App. 157a–158a; J.A. 210. Vasquez argues that these notations contradicted A.L.'s testimony that this assault involved only oral sex, and that the notations cast doubt on A.L.'s father's claim that A.L. was asleep when they returned home on the night of the incident. App. 157a. The trial court found, however, that this notation was consistent with A.L.'s trial testimony that Vasquez "was licking [her] private spot," identified later as her vaginal area, and that his tongue touched her both inside and outside. App. 158a–159a & 177a. The court also concluded that nothing in the record precludes the possibility of A.L.'s showering later in the evening, without her father's knowledge. App. 159a & 177a–178a.

2. The state appeals court reasonably concluded that Vasquez's counsel was not ineffective for failing to contact these witnesses and for failing to use the EMS run sheet.

The Ohio appeals court's conclusion that Vasquez's counsel was not ineffective must stand as long as it is not an unreasonable application of this Court's precedents. 28 U.S.C. § 2254(d)(1). "[A]n unreasonable application is different from an incorrect one," *Bell v. Cone*, 535 U.S. 685, 694 (2002), and a federal court may not grant a writ under AEDPA simply because the court "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law

erroneously or incorrectly," *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

The applicable precedent in this context is well-established. To prove ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, plagued by errors so serious that the attorney did not meet the meaning of the term "counsel" in the Sixth Amendment, and (2) that this performance prejudiced the defense to the degree that defendant was deprived of a fair trial. *Strickland*, 466 U.S. at 687. Judicial review of counsel's performance must be highly deferential at the outset; courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and the burden is on the defendant to prove otherwise. *Id.* at 689.

Taking the facts as a whole, the state appeals court (and, for that matter, the state trial court) concluded that counsel was not ineffective, finding that this information did not in any way support Vasquez's claims of innocence or his theory of the case. App. 141a. This decision was reasonable, and thus entitled to AEDPA deference, on both prongs of the *Strickland* test.

a. Counsel's performance was not deficient.

Trial counsel was not deficient for failing to investigate and call additional witnesses and for not using the EMS run report.

Investigation of Witnesses. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. And, of course, reasonableness must be measured "from counsel's perspective at the time." *Id.* at 690.

With respect to Becky Shaffer, Vasquez's counsel, Butler, faced a number of obstacles. Vasquez admitted that his family—which included Shaffer—had abandoned him. J.A. 1371–72. Vasquez himself had tried but failed to contact Shaffer on multiple occasions. J.A. 1371. Shaffer's mother confirmed that no family members would cooperate when Butler tried to contact them at Vasquez's request. App. 175a. And the value of Shaffer's potential testimony was further diminished by the fact that she had been asleep when the crime occurred. App. 165a.

Additionally, Butler was appointed late in the process—six weeks after Vasquez's arraignment. App. 156a. Butler advised Vasquez at that time to waive his speedy trial rights so that Butler could have more time to prepare the defense. J.A. 1130. Vasquez refused this request based on a conversation he had with another inmate, who suggested that the State would potentially dismiss the case against him based on speedy trial laws. J.A. 1356–58. Butler strongly advised him to reconsider, and told him that the short period of time would make the investigation more difficult: "I was stressing to him that the case was not going to run out of time, the Court wasn't going to let it run out of time, but if he

signed the speedy trial waiver maybe his family or his wife, they would come around." J.A. 1131. Nonetheless, Vasquez remained firm in his decision.

This Court has been clear that counsel's performance must be viewed in the context of all of the facts in a particular case, and that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 690–91.

Butler, faced with an uncooperative family and his client's refusal to waive his speedy trial rights to give Butler more time to persuade the family to aid the defense, chose to focus instead on investigating other matters in search of additional impeachment evidence. This Court has held that such a strategy is reasonable. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.* at 691. And Vasquez's decision not to waive his speedy trial rights must have some effect here; he chose to gamble on the possibility that the State might dismiss his case, and he must be held accountable for the consequences of that choice.

Hindsight—in the form of Shaffer's statements at the post-conviction proceeding—reveals that, had Butler pressed her individually, he might have gotten her to testify. But this Court has steadfastly refused to undermine counsel's decisions based on

the "distorting effects of hindsight." *Id.* at 689. And AEDPA amplifies the deference built into *Strickland*. The Sixth Circuit therefore had no basis for overturning the Ohio appeals court's reasonable conclusion that Butler's performance was not ineffective for failing to interview Shaffer. And, given the fact that Shaffer was the key to discovering Salopek and Snyder, Butler was not ineffective for failing to discover them.

EMS Run Sheet. The Sixth Circuit also found that counsel's performance was deficient because he failed to introduce the EMS report. The Sixth Circuit focused primarily on A.L.'s statement in the report that Vasquez "put it in her." App. 29a–30a. Counsel testified at the post-conviction proceeding that he read this statement as referring to Vasquez's tongue penetrating A.L.'s vagina:

> Q. Because you would have assumed, having received that particular EMS run sheet as part of the discovery from the prosecutor, that "he put it in her" referenced his tongue?
>
> A. Right. I had no information that it was referring to anything other than the tongue.

J.A. 1138. This understanding arose from A.L's consistent testimony throughout these proceedings that Vasquez performed oral sex on her. See, e.g., App. 158a–159a (A.L. testified that Vasquez performed oral sex on her, and that he touched both inside and outside her vagina with his tongue).

Yet the Sixth Circuit remained incredulous that Butler could have thought that the "it" in

question referred to Vasquez's tongue. The circuit court believed instead that the "more plausible" reading of the statement was that "it" referred to Vasquez's penis. App. 30a & 32a–33a n.3. Based primarily on this reasoning, the court found that counsel rendered deficient performance.

Nothing in the record indicates, however, that A.L. *at any point* suggested that Vasquez engaged in vaginal intercourse with her. Nor did any witness raise that possibility. It is therefore hard to fault counsel for reading the ambiguous term "it" in the only way supported by the facts of this case.

The state appeals court correctly recognized that counsel's reading of the EMS run sheet does not amount to deficient performance; the Sixth Circuit badly overreached by overturning that reasonable decision.

b. Vasquez was not prejudiced by any deficiency.

Even if counsel's performance was deficient (and it was not), Vasquez is entitled to relief only if the state appeals court unreasonably determined that he did not suffer any prejudice from this deficiency. The record reveals that no prejudice exists, for several reasons.

First, the main theme Vasquez seeks to highlight through the testimony of Shaffer, Salopek, and Snyder is that A.L. often lied, and that she did so to get attention. But Butler repeated that theme throughout the trial. A.L. admitted on cross examination that she had lied for attention before. See J.A. 665 ("Q. Have you ever done that [lie] before? A. Yes. Q. All right. Have you done that

often? A. Kind of.") & 666 ("Q. And when you tell them [others] something happened but you know it didn't happen, can you tell us why you do that? A. (Indicating). Q. I mean, is it your way of having fun? A. Yeah."). Further, Butler heavily underscored these admissions in closing argument. J.A. 921, 927. Any further evidence of A.L.'s failures to tell the truth would have been cumulative of evidence already before the jury. Introducing other witnesses to confirm what the victim herself has admitted would not have significantly strengthened the defense, and no prejudice inures from the omission of such cumulative evidence. See *Wong v. Belmontes*, 130 S. Ct. 383, 388–91 (2009).

Second, any non-cumulative evidence that Shaffer would have contributed has to be read with the knowledge that she would have admitted on cross examination, as she did in the post-conviction proceeding, that she took her own child to the hospital to determine whether Vasquez had sexually abused him as well. App. 165a–166a. Such a damning fact could have undercut Vasquez's entire case, and thus Shaffer would have had to offer extremely strong evidence to make up for the risk she posed. See *Darden v. Wainwright*, 477 U.S. 168, 185–86 (1986) (finding no ineffective assistance when counsel did not present evidence that would have opened the door to other, more damaging evidence).

Moreover, as both the state trial and appeals courts noted, none of the remaining evidence from these three witnesses or the EMS run sheet is particularly strong. Though Shaffer testified that A.L. was laughing in the back of the ambulance after she reported the assault, she later revealed that A.L.

did so in response to joking by the ambulance attendants designed to put her at ease. App. 165a–166a. Shaffer's claim that A.L.'s father prompted her to speak with various officials at the hospital, which the Sixth Circuit took to indicate that her story was untrue, App. 33a, was similarly revealed to be de minimis. In fact, A.L.'s father only prompted her to mention a detail about a light in the basement that she had omitted in her discussion, App. 166a; J.A. 1288, which is hardly out of the ordinary.

The only potentially valuable piece of evidence from Shaffer would be her statement that A.L. asked about being on TV in the ambulance. App. 165a. But the meager benefit from that shred of evidence would not have overcome the extreme prejudice that would have stemmed from Shaffer's admission that she worried that Vasquez had abused her son.

The potential testimony from the other two witnesses fares no better. Snyder would have added that A.L. did not appear upset over a month after the assault occurred, App. 169a, but that testimony is not particularly probative of any fact at issue. And the only other evidence Salopek would have contributed is that A.L. was often melodramatic and was able to manipulate her father. App. 167a. But these traits, which may fairly be applied to many adolescents, do not shed any serious light on the key issues in this case, and are at best further cumulative evidence of A.L.'s admitted tendency to lie or exaggerate.

As for the EMS run sheet, the Sixth Circuit suggested that it "demonstrates a specific and non-trivial difference in [A.L.'s] story over how the attack took place: the run-sheet implies [A.L.] reported that

there was penetration by Vasquez's penis in contradiction to the evidence at trial." App. 32a. But that "significant difference" exists only if the ambiguous statement is removed from the context of the allegations at trial—that Vasquez performed oral rape.

The only fact remaining is that the EMS run sheet states that A.L. said that she took a shower the night of the assault while her father testified at trial that she went to sleep when they got home. App. 158a–159a. These two statements, which are not mutually exclusive (she could have woken up later in the night and taken a shower), reflect a tangential difference that, at best, nibbles at the fringes of the State's case.

At bottom, then, Vasquez presents a variety of information, much of it cumulative, some of it only marginally relevant, and the rest outweighed by the prejudices that would have arisen had it been admitted. Such matters do not rise to the level of *Strickland* prejudice, and they certainly do not support a finding that the state courts unreasonably applied *Strickland*.

CONCLUSION

For the above reasons, the Court should grant the State's petition and summarily reverse the Sixth Circuit's decision.

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April 28, 2010

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 10-____

In the Supreme Court of the United States

KEITH SMITH, Warden,

Petitioner,

v.

ROBERT S. VASQUEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

No. 07-4466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT VASQUEZ,

Petitioner-Appellee,

v.

MARGARET BRADSHAW, Warden

Respondent-Appellant,

Filed: January 28, 2010

Before: MERRITT, BOGGS, and GRIFFIN, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Griffin would grant

rehearing for the reasons stated in his dissent. Further, the panel revises its opinion by adding a footnote, referenced at the end of the sentence at page 11, line 15 as follows:

> This statement, standing alone, would not have been constitutional error, as new testimony that "could not" have affected the outcome could not "undermine confidence in the outcome." However, the statement was far from alone and, indeed, was secondary to the direct misstatement of the applicable Supreme Court standard.

ENTERED BY ORDER OF THE COURT
s/Leonard Green
Clerk

APPENDIX B

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 09a0625n.06

No. 07-4466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT S. VASQUEZ,

Petitioner-Appellee,

v.

MARGARET BRADSHAW,

Respondent-Appellant.

On Appeal from the United States District Court
for the Northern District of Ohio

Filed: September 2, 2009
Leonard Green, Clerk

Before: MERRITT, BOGGS, and GRIFFIN; Circuit Judges.

BOGGS, Circuit Judge. Robert Vasquez, serving a life sentence for the rape of a child under the age of thirteen, petitioned the district court for a writ of habeas corpus. He argued that he received constitutionally ineffective assistance of counsel because his attorney failed to interview or locate several potential witnesses whose testimony would

have cast doubt on the credibility of the victim, the state's lone witness establishing Vasquez's guilt. The district court conditionally granted the writ, holding that the Ohio courts unreasonably applied federal law in denying his ineffective assistance of counsel claim. Warden Margaret Bradshaw now appeals from this decision, charging the district court with failing to accord the state courts deference under the Anti-Terrorism and Effective Death Penalty Act and with misapplying Sixth Amendment law to the attorney's actions. While we agree with the warden that the district court improperly disregarded the factual findings of the Ohio courts, we affirm the district court's decision. The Ohio courts applied law contrary to clearly established federal law, stating and applying an overly exacting standard for prejudice as a result of deficient counsel performance. On our own review of the record, even in light of the state courts' factual conclusions, we hold that Vasquez received constitutionally ineffective assistance of counsel and is entitled to habeas relief.

I

A

Vasquez was tried for the rape and kidnapping of nine-year-old A.L. On direct appeal, the Ohio courts summarized the facts of the crime, as established by the evidence at trial, as follows:

> On July 23, 2000, the nine-year-old victim and her father [S.L.], who is a Cleveland police officer, went to Don Shaffer's house. Shaffer is the victim's father's best friend. The father and the victim met Shaffer and his fiancee Becky Egbertson [now Becky Shaffer] and Becky's sister, Karra Vasquez, earlier in the

evening. They decided that Shaffer would pick up some fast food and they would go to Shaffer's house to eat. The victim's father first returned home to drop off his boat.

By the time the victim and her father arrived at Shaffer's house, it was late and Shaffer and Becky had retired for the night. However, staying with Shaffer was Becky's sister, Karra Vasquez and her husband, the defendant, Robert Vasquez, and their two small children. . . .

After they finished [eating], the victim's father went outside with Kara Vasquez, leaving the victim with Robert Vasquez. Vasquez invited the victim to go downstairs into the basement to watch television and to help him with his two small children. In the basement was a bunk bed. The victim testified that she climbed onto the top bunk and that Vasquez also climbed onto the top bunk after removing the bunk ladder. According to the victim, he then pushed her down with his arm and, while holding his hand over her mouth, he pulled down her pants and underwear and began licking her "private spot." As he was doing this, his two infant children were crawling around on the bottom bunk. He continued the assault until the victim's father called to her from the top of the stairs. The victim then put her clothes back on and went home.

The victim did not say anything about the assault to her father at that time. The next day, the father took the victim and her sister to spend a week with their grandparents . . . . When the girls returned, the father took

> them to Shaffer's house to babysit. Sometime later, Robert Vasquez and Don Shaffer returned from work. Robert Vasquez asked the victim several times to go down into the basement with him, but she refused. She then told Don Shaffer that she needed to talk to him. She told Shaffer that Robert Vasquez had sexually assaulted her.
>
> When the victim's father returned, Shaffer informed the victim's father what she had told him. The father called his partner at the police department to request that he come over to the house. He and his partner then talked with his daughter to explain the serious nature of the charges and to assure she was telling the truth. He then called 911. During this entire time, Vasquez remained in the basement until he was arrested later that night.
>
> The victim was taken by ambulance to Metro Hospital where she was interviewed by a social worker and a physical exam was performed.

State v. Vasquez, 2001 W.L. 1352781 at *1-*2 (Ohio Ct. App. 2001).

At trial, A.L.'s testimony was the only evidence presented by the state to demonstrate that the crime occurred or that Vasquez committed it. The state also offered testimony from A.L.'s father, Don Shaffer, the investigating police officer, and the social worker who interviewed A.L. Their testimony tended to provide circumstantial evidence of her credibility: that her story remained consistent throughout the investigation and that she acted out of the ordinary, including being fearful for her safety

and calling her father daily from school. The defense put on no evidence. Vasquez himself did not testify and no other witnesses were subpoenaed or called. Instead, Vasquez's attorney, Don Butler, pursued a strategy of highlighting the internal inconsistencies in A.L.'s testimony and casting doubt on her truthfulness.

The jury found Vasquez guilty. He was sentenced to life imprisonment for the rape of a minor under the age of thirteen and nine years on the kidnapping charge.

B

In addition to his unsuccessful direct appeal, Vasquez filed a petition for post-conviction relief in the Ohio Court of Common Pleas, alleging he received ineffective assistance of counsel. Because the resulting opinion is not clear as to which of its statements were factual findings and which were descriptions of testimony without credibility determinations, we recount the arguments and evidence presented in more detail than a habeas court ordinarily would.

1

Vasquez's petition argued, among other things, that his counsel failed to investigate adequately the circumstances surrounding the crime and A.L.'s accusation. This alleged failure resulted in his defense lacking several willing witnesses who could have cast doubt on A.L.'s version of events and on her credibility.

Specifically, Vasquez claimed that Butler, who was assigned to the case by the court after Vasquez's original court-appointed attorney asked to be relieved, never prepared a defense. The two men

met only three times prior to the trial. Vasquez alleges that he indicated to his attorney that his wife, Karra Vasquez, and his mother-in-law, JoAnn Kitchen, could provide helpful information but admitted that he did not know where his wife was staying during the trial. Vasquez also claimed that in addition to the face-to-face discussions, he sent Butler two ten-page letters detailing his version of events, but that Butler never mentioned the letters or followed up on the suggestions in them.

Vasquez also argued that Butler failed to locate available evidence and witnesses who would have challenged A.L.'s story and credibility. For instance, the EMS run-sheet produced by the responding EMT on the night that A.L. first accused Vasquez contained statements from A.L. that appear to be at odds with the state's theory of the crime. The run-sheet indicates that she told the EMT that Vasquez "put it in me" and that she had immediately showered on the night of the assault. At trial, on the other hand, she testified that Vasquez used only his tongue and indicated that she slept through the night on the couch with her father. Vasquez argued that these discrepancies from the initial revelation of the attack would have been a powerful impeachment of her trial story.

Vasquez also identified five witnesses who indicated they would have testified on Vasquez's behalf had Butler approached them. First, Karra Vasquez said that she called Butler twice but never received a return phone call. Vasquez argued that his wife could have testified to facts that would have made the attack less plausible: her presence in the small house, the basement door being open, the relatively short duration that A.L. was in the basement, and A.L.'s undisturbed clothes and normal

demeanor upon returning from the basement. She also would have testified to the circumstances related to the accusation, specifically that she overheard A.L.'s father coach A.L. about her story prior to telling the police.

Second, Becky Shaffer also indicated that she had not been contacted by Vasquez's attorney. Vasquez claimed that she had information about the evening of A.L.'s accusation that could cast doubt on its credibility. She rode to the hospital in the ambulance with A.L. that night. She would have testified that A.L. did not appear upset and was excited by the attention, even hoping that her accusation might get her on TV. She also would have testified that A.L.'s father was prompting his daughter's answers.

Third, Vasquez proffered the testimony of JoAnn Kitchen, Karra and Becky's mother. Kitchen had no direct knowledge of the crime or of A.L.'s accusation, but said that she was willing to testify as to A.L.'s truthfulness. As a family friend (in addition to the connection between her son-in-law Don Shaffer and A.L.'s father, Kitchen was familiar with A.L. and her family because A.L.'s father had dated a third daughter), Kitchen had frequently babysat for A.L. and interacted with her at family events. In her opinion, A.L. craved attention so much that she could not be trusted to tell the truth. Vasquez also argued that Kitchen was important to his ineffectiveness claim because she was the only family member who actually spoke with Butler. She claimed that in her conversation with Butler, she told him that she could not help, but denies that she refused Butler access to her daughter or indicated that the family was unwilling to help.

Finally, Vasquez offered two additional witnesses: Tammy Salopek and her daughter, Ashley Snyder. Salopek is a family friend to both A.L.'s family and the Shaffers. Vasquez claimed that she was thus easily identified and located by Butler if he had spoken with Becky Shaffer about mutual acquaintances. Both Salopek and her daughter had extensive social contact with A.L.. They indicated they would have testified to A.L.'s lack of truthfulness – specifically her willingness to lie to get attention. They also could have testified to A.L.'s demeanor immediately after the accusation, as A.L. slept over at Salopek's home the following week. Contrary to the evidence at trial, neither mother or daughter observed any strange or out-of-the-ordinary behavior in A.L.. Further, Vasquez argued that Salopek and her daughter would have provided more substance to a defense theory that A.L. fabricated the story because Ashley Snyder had, earlier in the summer of 2000, been the victim of sexual molestation and had shared her story with A.L.

Together, Vasquez argued that these witnesses demonstrated that his attorney failed to locate evidence and witnesses that could have undermined the plausibility of the case and A.L.'s credibility. Vasquez pointed out that this testimony tended to show that the layout of the house made the attack unlikely and the fact that she changed her story from the EMS report and received coaching from her father. Moreover, a competent attorney could have put on a defense that explained how a nine-year-old would be familiar enough with sexual assaults to manufacture a story (months earlier she heard details of Ashley Snyder's own sexual molestation) and why she might do so (she has a history of lying for attention; she even hoped to be on

TV after accusing Vasquez). Accordingly, Vasquez asked for a new trial.

2

The Ohio court held an evidentiary hearing on Vasquez's claims of ineffective representation. The court took testimony from the five witnesses recounted above who supposedly would have participated in Vasquez's defense but for Butler's failure to locate them during his investigation. Vasquez and Butler also testified.

The five witnesses each testified consistently with their affidavits and Vasquez's petition described above, outside of a few concessions on cross examination. (For instance, Becky Shaffer admitted that A.L.'s laughing in the ambulance was in response to the EMT's joking.)

Vasquez testified that prior to trial he had difficulty even learning the identity of his attorney. Once he did discover his attorney's name and contact information, he met with him only three times, and none of those meetings lasted longer than a few minutes and involved little substantive discussion of his case. He asserted that he identified at least his wife and JoAnn Kitchen as people to contact. He repeated that he sent letters to Butler and that claimed that it appeared Butler ignored them, asking basic questions in their meetings that had been answered in the letters.

Butler denied Vasquez's characterization of his defense. He admitted that he met with Vasquez only three times, but argued that he discussed the case at length with his client, but that Vasquez provided no helpful information. When Butler did find Karra Vasquez at her mother's home, he claimed that JoAnn Kitchen refused to speak with him except

to indicate that Karra (and the rest of the family) would not help the defense. As to Becky Shaffer, Butler indicated that Don Shaffer's friendship with A.L.'s father and the fact that he was a state's witness made him believe it unlikely that she would help the defense. He also indicated that he did research into child sex abuse cases generally and that he concluded that the best strategy was to attack A.L.'s testimony.

After rehearsing this testimony in detail, the court denied Vasquez's petition. The court explained that "Butler's testimony not only showed no failure in his obligation to prepare the case for trial in general, but specifically concerning the subpoenaing of witnesses, his testimony and of others showed that the defendant's family members refused to cooperate with the defense." *Ibid.* The court continued: "perhaps most importantly, not one of the witnesses who testified . . . offered any testimony that could have changed the outcome of defendant's trial."

Reviewing for abuse of discretion, the Ohio Court of Appeals affirmed the denial of Vasquez's petition. The Supreme Court of Ohio denied discretionary review.

C

Vasquez filed his petition for a writ of habeas corpus with the district court in June 2005. His listed grounds for relief included, *inter alia*, his assertion that his attorney's limited investigation was unreasonable and therefore denied him effective assistance of counsel.

The district court first acknowledged that it "must generally defer to the factual finding of the state courts," but declined to do so here because "[a] comprehensive review of the 800-plus pages of

transcript in the record, in addition to the rest of the documents contained in the record, provides clear and convincing evidence that the facts as found in the Direct Appeal Opinion and Post-conviction Hearing Findings . . . are inaccurate in numerous places." The district court, now feeling freed of its usual deference, thereafter undertook a comprehensive discussion of all of the postconviction testimony, complete with citations to the record.

Turning to the legal question, the district court concluded that "the state court application of *Strickland* in this case was objectively unreasonable." Specifically, "Butler's performance as a whole was deficient. . . . Butler simply failed in his duty to conduct an objectively reasonable investigation on which to base his conclusions about trial strategy . . . ." The court highlighted Butler's failure to identify or interview several potential defense witnesses and the short amount of attention given directly to Vasquez as evidence of the deficiency. And this "deficient performance prejudiced the defense sufficiently to undermine the reliability of the trial, and thus the state appeals court's findings to the contrary were an objectively unreasonable application of *Strickland*'s prejudice element." Accordingly, the district court granted his petition.

II

The Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244 *et seq.*, requires us, when adjudicating a petition for habeas corpus challenging the legality of a state court conviction, to defer to a final decision on the merits – of fact or law – of the state court that first decided the claims raised. The same Congressionally-supplied standards governed the district court's

consideration of Vasquez's petition and, accordingly, our focus is not on the errors that the warden charges to the district court, but on the state court record and whether it warrants the relief Vasquez requests. *See Parker v. Renico*, 506 F.3d 444, 447 (6th Cir. 2007) ("We review de novo the district court's decision to grant or deny habeas relief.").

A

AEDPA requires that the writ shall not issue unless we determine that the state court's adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

For an allegation of constitutionally ineffective assistance of counsel, the relevant "clearly established federal law" is *Strickland v. Washington*, 466 U.S. 668 (1984). A counsel's performance is a deprivation of a defendant's Sixth Amendment right to counsel where a defendant shows his counsel's assistance was both deficient and that the deficiency prejudiced the defendant. A performance is deficient only if it "fell below an objective standard of reasonableness" in light of the "prevailing professional norms." *Id.* at 687-88. And a deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." *Id.* at 694.

The Ohio trial court did not follow this clearly established law. To be sure, the court cited *Strickland* and identified a two-part test, measuring for deficiency and prejudice. But the court stated that prejudice occurs only when "the result of petitioner's trial or legal proceeding *would have been different* had defense counsel provided proper representation." (emphasis added). After reviewing both Ohio and federal law, the court repeated itself, explaining that "[i]n order to demonstrate a claim of trial counsel's ineffectiveness according to the United States Supreme Court, a postconviction petitioner is required to demonstrate that (1) the performance of defense counsel was seriously flawed . . . and (2) the result of petitioner's trial or legal proceeding would have been different had defense counsel provided proper representation." (citing *Strickland* (without providing a pin cite)). This was not a slip of the pen during a rote repetition of a rule corrected upon application of law to fact. In analyzing Vasquez's claim as to the failure to interview and call potential defense witnesses, the court relied directly on its version of the ineffectiveness standard as crucial to its decision against relief: "perhaps most importantly, not one of the witnesses who testified [at the post conviction hearing] . . . offered any testimony that could have changed the outcome of defendant's trial." The court repeated, in the context of a different claim of ineffectiveness, that "even if the Court found that Butler's question demonstrated a deficiency . . . defendant has shown no resulting prejudice. As demonstrated above, neither the testimony of Mrs. Vasquez or Becky Shaffer would not [*sic*] have changed the outcome of the trial."

The Ohio Court of Appeals, reviewing for abuse of discretion,[1] repeated the error. It framed its

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[1] The Ohio appellate courts review a trial court's decision as to a post-conviction petition for relief under an abuse of discretion standard. *See, e.g., State v. Gondor*, 860 N.E.2d 77, 86 (Ohio 2006). This raises an apparently unresolved question about the state decision a federal court should defer to under AEDPA. Where an appellate court reviews under an "abuse of discretion" standard, it is not adjudicating the merits of the claim so much as the merits of the decision under review. The question is only whether it fell into what is presumably a broad band of discretion. AEDPA, however, is meant to secure deference to the application of federal law by a state court in its "adjudicate[ion] on the merits" of a petitioner's claim. 28 U.S.C. § 2254(d). Accordingly, AEDPA perhaps does not have anything to say about a state court's decision that another state court did not abuse its discretion -- it is concerned only with whether the *actual* adjudication of the merits of petitioner's claim was contrary to, or an unreasonable application of, federal law. On this view, we should focus our analysis on the lower court's adjudication and not the appellate court. This approach finds analogical support in our court's refusal to give AEDPA deference to a state appellate court review for plain error. *See Benge v. Johnson*, 474 F.3d 236, 246 (6th Cir. 2007) ("Because Benge could have met his burden under *Strickland* despite not being able to demonstrate plain error, this analysis did not constitute an 'adjudication on the merits' of Benge's ineffective-assistance-of-counsel claim.") (quoting 28 U.S.C. § 2254(d)). Other cases, however, have focused on the reasoning actually followed by the state court and not the standard of review applied. *See Fleming v. Metrish*, 556 F.3d 520, 530-32 (6th Cir. 2009) (distinguishing *Benge* and holding a review for plain error is an adjudication on the merits where the state appellate court first determined the merits of the claimed error before holding that it did not effect substantial rights).

Nevertheless, we do not find it necessary to resolve this issue here because we hold that the appellate court also applied law contrary to the *Strickland* standard by asking whether the outcome would have been different. We note that it is plausible

rejection of Vasquez's appeal in terms of a changed-outcome: "defendant presented numerous witnesses who did not testify at his trial. Their absence . . . does not demonstrate his counsel was ineffective and that the outcome of his trial *would have been different* had they been witnesses . . . ." (emphasis added). In analyzing the argument, the appeals court expressly adopted the trial court's reasoning: "[w]e agree with the trial court's conclusion that 'not one of the witnesses who testified . . . offered any testimony that could have changed the outcome of defendant's trial.'"

This is not a casual error. A "reasonable probability" of difference does not mean "would have been different." The latter formulation puts a greater burden on the petitioner. To prevail on his claim as it was adjudicated, Vasquez was required not only to show that his counsel's deficiency "undermine[d] confidence in the outcome," *Strickland* 466 U.S. at 694, but to prove that a trial with competent counsel actually would have resulted in his acquittal. In interpreting what Congress meant in § 2254(d), the Supreme Court used a similar mistake as the paradigmatic example of an application of law "contrary to clearly established federal law" that deserves no deference under the statute. The Court explained:

> A state court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law . . . . Take, for example, our decision in *Strickland* . . . . If a state court

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that a state appellate court might, without repeating the mistake of a lower court, still affirm because it is applying a deferential standard of review.

> were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to [the Court's] clearly established precedent because [it] held in *Strickland* that the prisoner need only demonstrate a 'reasonable probability that . . . the result of the proceeding would have been different.'

(Terry) Williams v. Taylor, 529 U.S. 362, 405-06 (2001) (internal citations omitted).

Of course, the error there, picked by the Supreme Court for its clarity in illustrating application of contrary law, precisely defined the quantum of proof. The Ohio courts left it at "would have been different," unadorned by the truly offending words "preponderance of the evidence." It could be argued that, in the spirit of the deference demanded by AEDPA, we should give the Ohio trial court's statement the benefit of the doubt and assume that the court implied the words "reasonable probability." *See Holland v. Jackson*, 542 U.S. 649, 654-55 (2004) (reversing a decision that the state court decision was "contrary to" *Strickland* because "use of the unadorned word 'probably' is permissible shorthand when the complete *Strickland* standard is elsewhere recited."). After all, as the warden argues, the appellate court, consistent with Supreme Court precedent, stated the correct standard once.

We are not persuaded. Different standards make for different outcomes. Even where a state court "explicitly delineated the *Strickland* test," its

decision is "contrary to" federal law where the court applied an "incorrect burden of proof." *West v. Bell*, 550 F.3d 542, 552 (6th Cir. 2008). Indeed, our court has already held that a state's court use of a "would have compelled acquittal" formulation is "contrary to" federal law. *Tinsley v. Million*, 399 F.3d 796, 807 (6th Cir. 2005). While the appellate court did say "reasonable probability" once, the use of the incorrect words cannot be regarded as anodyne "shorthand," *e.g. Woodford v. Visciotti*, 537 U.S. 19, 23 (2002), because they actually describe and apply a different standard. The court of appeals emphasized the inability to meet the prejudice prong, underscoring whether the trial "would have been different," and expressly adopted the erroneous legal reasoning of the court below. Accordingly, we hold that the Ohio courts applied law that was contrary to clearly established federal law and we are therefore "unconstrained by § 2254(d)(1) . . . and de novo review is appropriate." *Fulcher v. Motley*, 444 F.3d 791, 799 (6th Cir. 2006) (citing *Williams*, 529 U.S. at 407).

B

AEDPA also supplies our standard for reviewing a factual record. The statute provides that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Only if Vasquez "rebut[s] the presumption of correctness by clear and convincing evidence" may we disregard those determinations. *Ibid.* The district court held that this burden was carried. Vasquez agrees; the warden argues strenuously that the district court erred.

Before resolving this dispute, its necessary to clarify what the issue is. The Ohio trial court's decision was opaque about its findings of fact. Its

opinion, to be sure, contained a section labeled "Findings of Fact." But the section gives no definitive statement of "the facts". Nor does it resolve any of the testimonial inconsistencies discussed. Instead, it provides the background to its decision: a statement of the applicable legal rules, a summary of the factual testimony given by each witness at the post-conviction hearing, and portions of trial transcript relevant to certain post-conviction issues. None of this is the sort of "determination of a factual issue" that § 2254(e)(1) requires us to accept.

The court's "Conclusions of Law" section, however, does make a series of statements, which reveal some of the facts that it evidently found essential to its decision. The dispute over whether the district court accorded the proper deference is limited to only these statements, where the district court's "determination of a factual issue" are actually discernable from its decision. Those statements are:

- "[T]he defendant's family members refused to cooperate with the defense." Specifically, "Butler explained, and the witnesses themselves corroborated, that Mrs. Vasquez, Becky Shaffer and Mrs. Kitchen refused to cooperate in his defense"
- "Butler's explanation concerning his efforts to contact these family members and their uncooperativeness was corroborated by detective Chappelle"
- "Since Tammy Salopek was a friend of Becky's, had Becky been cooperative with Butler, he could have possible [sic] learned of her, and her daughter's availability."

In light of the number of witnesses and the relative complexity of the fact situation, this lack of detail is both surprising and frustrating to a federal court attempting to reconstruct the trial and the post-conviction hearing to decide if habeas relief is warranted. This frustration likely explains the district court's decision to conduct its own "comprehensive review" of the record and, ultimately, to rely wholesale on that review in place of the Ohio court's findings, without demonstrating which, if any, findings are specifically rebutted by clear and convincing evidence. But, whether or not understandable, the district court did not do what AEDPA required of it.

Under § 2254(e)(1), a proper comparison of these limited findings of fact to the record asks whether they are contradicted by clear and convincing evidence. The state court's findings as to Karra Vasquez and Kitchen are not. First, the state court's conclusion that Kitchen was not cooperative resolves the credibility dispute between Butler (who insisted she refused to help and said no one would) and Kitchen (who denied that she refused to help) in favor of the attorney. A reviewing court, relying on cold transcripts, is not in position to displace such a resolution. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Second, the state court's reference to the corroboration of Butler's efforts to contact Karra Vasquez means that Butler's only means of contacting Karra Vasquez was through JoAnn Kitchen. (Detective Chappelle testified to the same difficulty in contacting Karra Vasquez.) If Butler is to be believed over Kitchen, as the state court's opinion requires, Kitchen's refusal also blocked his access to Karra Vasquez.

In contrast, the court's discussions regarding Becky Shaffer is not a determination of fact that forecloses Vasquez's argument. It is true that the court grouped her with Karra and Kitchen as someone that "refused to cooperate." But it is dubious that this statement, contained in a summary statement listing Karra Vasquez and Kitchen, reflects a factual determination by the court. *See Wiggins v. Smith*, 539 U.S. 510, 530-31 (2005) (evaluating a state court's conclusory factual finding in light of its explanation and denying it deference under § 2254(e)(1)). Unlike Kitchen (and Karra Vasquez, who was known to be living with Kitchen at the time Butler called her), Butler never contacted or even attempted to contact Becky Shaffer. There was therefore no opportunity for her to "refuse to cooperate" and the court could not have so determined. Instead, its reasoning that "Butler's professional opinion that Becky Shaffer would not be of assistance since her husband was a State's witness, and because of Mrs. Kitchen's representations that no one in the family would help, is a decision that is solely within defense counsel's discretion" is a better reflection of the court's holding as to Becky Shaffer. To the extent that the court relied on her "refusal," it appears from this statement that it was actually deciding that Butler's conclusion that she *would have* refused was reasonable. That was a legal conclusion and we review it as such below.

The trial court's conclusions about the EMS run-sheet also do not merit § 2254(e)(1) deference. The court concluded that the information it contained actually corroborates A.L.'s trial testimony. While credibility determinations as between counsel and potential witnesses regarding what happened pretrial must be deferred to as a

factual determination, this conclusion is different. The court decided that one interpretation of the evidence (the EMS run-sheet corroborated A.L.'s testimony) was better than another (that it contradicted both A.L.'s and her father's testimony). But both would have been permissible interpretations for the jury to draw had the EMS run-sheet been presented to the jury in the first instance, and so this reasoning is actually a holding that Vasquez has not carried his burden to show prejudice resulting from his attorney's failure to identify the run-sheet as useful impeachment evidence. *See Ramonez v. Berghuis*, 490 F.3d 482, 490 (6th Cir. 2007) ("[W]hat the state court has really done is to state its view that there is not a reasonable probability that the jury would believe the testimony and thus change its verdict."). Accordingly, we review it de novo below.

To reiterate, on the facts as we must take them, based on the implications of the state court's decision and the operation of AEDPA deference, Vasquez cannot base his ineffective assistance of counsel argument on the failure to investigate Karra Vasquez or JoAnn Kitchen. They refused to cooperate and any amount of investigation by Butler would not have made a difference. But Vasquez may base his claim on the failure to investigate and put in the record the EMS run sheet and Becky Shaffer's account of A.L.'s credibility. By extension, Vasquez may also rely on the testimony of Salopek and Snyder, who (by admission of the trial court) likely would have been found through an interview with Shaffer, in making his claim.

III

The ultimate issue, then, is whether the failure by Vasquez's counsel to uncover the

impeachment evidence from the EMS run-sheet, Becky Shaffer, Tammy Salopek, and Ashley Snyder resulted from deficient performance and, if so, whether it prejudiced the outcome of the trial.

A

Constitutional competence is not a high bar for an attorney to reach. The question is whether the representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In determinating whether a performance was reasonable, we give a healthy amount of deference to counsel's tactical and litigation decisions; they are "virtually unchallengeable" in the ordinary case. *Id.* at 690. But this deference to strategic choices has always been tempered by a requirement that the choices themselves be informed: "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 691 Accordingly, "a particular decision not to investigate must be directly assessed for reasonableness." *Ibid.* Our circuit has expressed this principle with more color: "the investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the 'strategic' choice erected upon it rest on a rotten foundation." *Ramonez*, 490 F.3d at 488.

The law as developed so far has not settled on a definitive statement of what a "reasonable investigation" entails. But well established principles suggest that Vasquez's claim that his attorney failed to identify key evidence and failed to locate and interview critical witnesses is within the known contours of the duty. *See, e.g., Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005) (noting that the duty on counsel to investigate "includes the

obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence."); *see also Clinkscale v. Carter*, 375 F.3d 430, 443 (6th Cir. 2004) (collecting cases for the proposition that failing to investigate or call potential defense witnesses constitutes constitutionally deficient representation). That the missing evidence alleged here is impeachment evidence and not, as in some ineffective assistance cases, direct evidence of innocence does not reduce the applicability of this principle. *See Tucker v. Ozmint*, 350 F.3d 433, 444 (4th Cir. 2003) ("Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel."). This is because we are assessing the reasonableness of the representation and the defenses available to the attorney change what is reasonable: where there are no direct witnesses to the alleged crime beyond the perpetrator and the victim, impeachment evidence is at a premium.

The circumstances ordinarily surrounding an accusation of child sexual abuse underscore this concern for developing impeachment evidence. As the Second Circuit has explained, "these cases frequently hinge on judgments about credibility in which jurors must choose between contradictory stories proffered by the defendants and the complainants" because "third-party witnesses [are] often unavailable . . . ." *Eze v. Senkowski*, 321 F.3d 110, 112 (2d Cir. 2003). Thus, that court adopted a rule that "defense counsel is obliged, wherever possible, to elucidate any inconsistences in the complainant's testimony, protect the defendant's credibility, and attack vigorously the reliability of any physical evidence of sexual contact between the defendant and the complainant." *Ibid.* While

adopting a unique standard of care for sexual abuse cases is unnecessary at this time, the Second Circuit's admonition is compelling here, in light of what Butler knew as he was undertaking his investigation and defense of Vasquez.

Prior to trial, Butler must have known there was no plausible defense of Vasquez other than attacking A.L.'s credibility. The only witnesses to the crime were A.L. and Vasquez, so producing a witness with a different account was impossible. There was no physical evidence for him to counter, or to demonstrate that a different person was involved. There was no possibility of an alibi; Vasquez was undeniably in the basement with A.L. And in fact, Butler identified no defense witnesses and called none at trial.[2]

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[2] The warden attributes this failure to Vasquez. It is true that Vasquez only told Butler to contact his wife and mother-in-law and, apparently, did not mention Becky Shaffer or anyone else as a potential witness. This might be a persuasive rejoinder to Vasquez's allegations if Becky Shaffer were not such an obvious person to contact because: (1) she is Vasquez's sister-in-law (at the very least, Butler may have contacted her to get in touch with Karra Vasquez); (2) the crime took place in her home; (3) she was present in the home at the time it occurred; and (4) she was present immediately after A.L.'s accusation.

This attribution is part of a strategy, on the part of both the warden and the state court, to place the attorney's failure to investigate at Vasquez's feet. While we are sympathetic to the defense attorney who has a client that will not help, we do not believe our cases to support the proposition that a defendant gets only the defense that he is capable of providing personally. (They hold only that it is not unreasonable for an attorney to limit investigation once her client has frustrated her otherwise reasonable efforts. *See, e.g., Lorraine v. Coyle*, 291 F.3d 416, 435 (6th Cir. 2002)). The Sixth Amendment guarantees minimally effective representation because the adversarial

Indeed, viewing the situation (as we must) "from counsel's perspective at the time," *Strickland*, 466 U.S. at 689, four facts were clear and should have pointed him toward the investigation necessary to put on a stronger defense. First, A.L.'s story was never crystal clear, suggesting that perhaps a well-informed cross-examination and a contradicting defense witness could have raised a reasonable doubt as to its veracity. Second, all of the people involved in the crime and its revelation were extremely interrelated, suggesting that there is a convoluted back-story that could have provided context for the jurors to understand the accusation and resolve testimonial inconsistencies. Third, Becky Shaffer was the sister-in-law of Vasquez, at the place of the attack on the night it occurred, and with A.L. immediately her accusation, all suggesting that she may have had information useful to the first two facts. Fourth, he had discovery materials from the state that, among other things, contained the EMS report and the names and contact information of the people the police investigated, including Becky Shaffer.

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testing of the state's case, a cornerstone of our criminal justice system, is very difficult without counsel. *See Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) ("In making the competency determination, the court should keep in mind that counsel's function . . . is to make the adversarial testing process work . . . .") (internal quotation marks omitted). An attorney (especially an experienced one like Don Butler) has skills and knowledge beyond the ken of an average criminal defendant. He should be expected to take a sober account of the case he is presented with and proceed to put together the best challenge to the prosecution's proof. This is true even if he must use information gleaned from discovery and investigation instead of the defendant's mouth.

It is against this background that Butler's decisions against investigation are unreasonable. Our recent decision in *Brown v. Smith* illustrates how the thinness of the prosecution's case affects our judgment regarding an attorney's decisions against investigation. 551 F.3d 424 (6th Cir. 2008). In that case the petitioner, also convicted of child sexual abuse, alleged that his attorneys were ineffective for failing to interview the psychiatrist who had treated the accuser and lone witness. We explained that because the "entire case hinged on the credibility of [the accuser], and defense counsel were aware that [the psychiatrist] . . . had treated her near the time of the alleged assault," it was "negligent – indeed, constitutionally deficient – for Brown's attorneys not to seek *in camera* review of the counseling records . . . ." *Id.* at 431. Similar reasoning applies here: Butler knew that Becky Shaffer was ideally situated to provide information on the only avenue of defense available to Vasquez and that the EMS report contained information contradicting the version of events that the state was alleging at trial. He was therefore deficient by declining to pursue these leads.

Perhaps if Butler knew of other witnesses certain to be cooperative or physical evidence tending to show innocence, it would have been reasonable for him to focus his limited time and resources on developing a different defense based on that evidence. But he did not and so it was not reasonable to interview no potential witnesses and develop no defense. *See Williams v. Washington*, 59 F.3d 673, 681 (7th Cir. 1995) ("Because investigation [of the witnesses] might have revealed evidence bearing upon credibility (which counsel believed was the sole issue in the case), the failure to investigate was not objectively reasonable."); *see also Bigelow v. Williams*, 367 F.3d 562, 572 (6th Cir. 2004) (holding

counsel's representation deficient because he failed to investigate a possible alibi witness once the witness's identity was discovered).

The state court held that Butler's decision was reasonable as to Becky Shaffer because of Kitchen's statement and because Becky's husband was a state's witness. Kitchen's statement makes sense as a basis to discount Karra Vasquez – Butler had to go through Kitchen to contact her – but less so for Becky Shaffer. Becky could be contacted independently and, while she was a member of the family (Vasquez's sister-in-law) and *may* have had reasons not to cooperate, it is incredible for Butler to base a decision against interviewing her on a single statement from the witness's mother. As to Becky's husband Don Shaffer being a state's witness, that could explain a decision *not to call* Becky but not why he did *not attempt to talk with her* in the first instance. *Cf. Brown*, 551 F.3d at 432 ("[O]ur quarrel is not with trial counsels' decision to forgo calling . . . a witness *per se*, but rather with the lack of any reasonable, timely investigation into what she might have offered the defense."). Moreover, neither argument takes into account that Butler knew that Becky Shaffer was likely to have relevant information and talking with her could help a develop an otherwise non-existent defense.

Using the EMS run-sheet to impeach A.L. and the other government witnesses (and as a basis for further investigation) should have been an even more straightforward decision for Butler. Through discovery, Butler had direct knowledge of the EMS report, which contained information demonstrating inconsistencies in A.L.'s story: she described the attack then as "he put it in me" and not as Vasquez licking her vagina, and she claimed that she had

taken a shower on the night of the attack (which contradicts her father's testimony that she fell asleep on the couch with her father).

The state court reasoned that there was no contradiction between the EMS report and the testimony because its possible that (1) the "it" in the EMS description was Vasquez's tongue and (2) that A.L. showered after her father went to sleep. This post hoc harmonization is not impossible as a matter of logic but does not explain Butler's indifference to the potential inconsistency (the disharmonious explanation is probably more plausible). He did not try to *find out* whether or not the testimony of A.L. and her father would stand up to impeachment on the basis of the EMS report. Moreover, Butler should have identified the report as particularly probative because it was made so close to the original report of the attack, so its inconsistency would sharply undercut the corroborative testimony based on interviews with A.L. that took place much later. For instance, penetration and licking are much different acts and the fact that A.L. may have changed her story between the two should have been recognized as premium impeachment evidence. The report further signals an opportunity to track down and interview the EMS respondent, who would have been in a position to testify as to A.L.'s demeanor in the ambulance on the way to her exam, possibly corroborating Becky Shaffer's testimony that A.L. was at ease in the ambulance and more concerned with the attention she was receiving than disturbed by the abuse she reported.

The warden argues that this line of argument is an impermissible second-guessing of Butler's strategic decision making. Accepting the patently debatable premise that the omissions discussed in

this opinion were the result of a conscious strategy on Butler's part, the foregoing account of what Butler knew (and what the prospects for Vasquez's defense were) when he decided against continued investigation demonstrates that decision was "objectively unreasonable because it was a decision made without undertaking a full investigation" and therefore not due deference. *Towns*, 395 F.3d at 259 (internal quotations omitted); *see also Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1990) ("Where counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe they would not be valuable in securing defendant's release, counsel's inaction constitutes negligence, not trial strategy.") (internal quotations omitted). To this, we add only that the pretrial investigation actually admitted to by Butler – his legal research on sex abuse and child rape cases – should have pointed him toward the investigation he failed to undertake. It is well known in the literature (and the cases cited above) that the credibility of the child witness is often central to the success of child sex abuse prosecutions and that the circumstances surrounding the initial accusation of the abuse are important indicia of credibility. *See generally, e.g.*, Kamela London et al., *Disclosure of Child Sexual Abuse: What Does Research Tell Us About the Ways that Children Tell?*, 11 PSYCH. PUB. POL. & L. 194 (2005) (discussing various psychological models of children's accusations of child sexual abuse and their importance to understanding the accuracy of testimony in child sexual abuse trials). This suggests that, even without knowing what Butler knew about the available evidence, Becky Shaffer and the EMS run-sheet would be natural starting points to an investigation and a defense. Yet, Vasquez's attorney did not pursue these leads. We

do not believe that this behavior can accurately be described as a "strategic choice". Instead, we hold it to be representation "below an objective standard of reasonableness" and constitutionally deficient. *Strickland*, 466 U.S. at 688.

B

This deficient representation only amounts to a violation of Vasquez's Sixth Amendment rights if it resulted in prejudice – a probability of a different result that is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In determining whether Vasquez has carried his burden, we must evaluate the deficiency in light of the "totality of the evidence before the . . . jury." *Id.* at 695. And so, in a case in which the "verdict or conclusion [is] only weakly supported by the record is more likely to have been affected by errors . . . ." *Id.* at 696. Accordingly, in cases like this one, where the only evidence of the crime or the defendant's guilt is the testimony of the victim, our circuit has been especially willing to find prejudice from deficient representation because "[t]he lack of physical evidence confirming sexual activity meant that this was necessarily a close case at the trial level." *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir. 2005).

The missing evidence here undermines our confidence that had Butler pursued the leads he had immediately available to him the same outcome would have obtained. The EMS report demonstrates a specific and non-trivial difference in her story over how the attack took place: the run-sheet implies A.L. reported that there was penetration by Vasquez's penis in contradiction to the evidence at trial.[3]

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[3] The state court's harmonization that the "it" could be Vasquez's tongue is not responsive to our focus about how the

Becky Shaffer's account reveals inconsistences in A.L.'s timeline; that S.L. coached A.L. and was prompting responses to the police; that she acted relaxed and not in conformity with a girl recently revealing a traumatic experience; and specific revelations that A.L.'s concern was over attention (would she get on TV) and not the crime. Speaking with her would have also led Butler to additional defense witnesses. The testimony from Salopek and her daughter, in turn, would have provided detailed reasons that A.L. is not trustworthy and does not understand the consequences of her lies; that she was not acting out-of-the-ordinary the week after she revealed the attack; and that A.L. had just learned of the sexual abuse suffered by Snyder. Together, this evidence challenges the specifics of her story, her motivations, and her general truthfulness. Moreover and equally important, it undermines the corroboration evidence presented by the state – that A.L.'s story did not change in her retelling of it, that she acted out of character after the attack, and the

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jury would likely have taken it. Coupled with the inconsistency about the shower, we think it likely a jury would consider the run-sheet evidence of instability in A.L.'s story. This is especially so because it is unlikely that the jury would believe a nine-year-old would colloquially describe Vasquez's licking as "put[ting] it in," whereas she might be likely to use that term for penetration. Moreover, unlike A.L.'s story at trial, penetration is not consistent with the circumstances of the attack occurring in a short window of time, with her father's presence upstairs, and on the same bunk-bed where Vasquez's children were sleeping. In any case, the fact that we cannot be sure about how the jury would take the evidence does not prevent a finding of prejudice, since Vasquez need only undermine our confidence in the outcome, not prove that a different outcome was certain with competent counsel.

implausibility of a nine-year old making up such a sexual-molestation story.

The warden makes two arguments against the prejudicial effect of this missing evidence. First, the warden argues that Becky Shaffer may not have in fact cooperated because she declined to give a written statement to the investigating police officer. This fact is not as significant as the warden would have it. Shaffer did speak with the officer, but chose not to give a written statement after her husband had already given one. It is true that she did not, on her own volition, volunteer facts to the police officer, but that is not evidence of what she would have said had she been directly asked. Indeed, legally trained defense counsel are likely to ask different questions and bring a different context to the investigation than the investigating police officer. The police officer was trying to establish the facts of the attack. Butler, undertaking his investigation with an understanding of the state's case, would be building a case specifically against A.L.'s version of events. He likely would have asked different questions and placed greater weight on information to present a jury. For instance, he may have focused on the ambulance ride (because it would be the best evidence of how A.L. acted immediately after accusing Vasquez) and on information about A.L.'s credibility as a witness, rather than on what happened the night of the attack. According to Becky Shaffer's testimony, such questions would have elicited the answers that now provide important impeachment evidence.

Second, the warden argues that the additional evidence was cumulative on Butler's attacks against A.L.'s credibility. To be sure, "evidence that is merely cumulative of that already presented does not

. . . establish prejudice." *Getsy v. Mitchell*, 495 F.3d 295, 313 (6th Cir. 2007) (en banc) (internal quotations omitted). Our cases, however, do not tell us clearly when evidence becomes sufficiently different to no longer be "cumulative" or at what level of generality one must compare the evidence. In our most skeptical formulation, we have said, "in order to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way – in strength and subject matter – from the evidence actually presented . . . ." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005). In light of the weakness of the defense at trial, the missing evidence here satisfies even this high standard.

Butler used the cross-examination of the prosecution's witnesses to attack A.L.'s credibility and to imply that her story changed. For instance, A.L. admitted that she sometimes lies and that her father has to punish her for that. A.L.'s father agreed that he sometimes had to punish her for lying. He admitted that he repeatedly went over the accusation with her to make sure she was telling the truth. He also admitted that during the eleven days between the incident and her report of it, he did not hear anything to indicate A.L. (who was visiting relatives) acted out of the ordinary. Further, Butler used A.L.'s father to demonstrate differences between the version of the attack in the police report and the version recorded as the attack history in the hospital, where A.L. did not tell the doctor that Vasquez covered her mouth or that the attack ended when her father called for her. Similarly, on cross examination Don Shaffer indicated that those same details in the hospital report were not in A.L.'s initial description of the attack to him. Butler relied on this testimony to create a narrative in closing about A.L.'s credibility, suggesting that she was caught in

a lie by her father, but insisted on the truth of the accusation to avoid the consequences of having lied about it to her father.

The missing evidence is not cumulative on these narrow admissions that Butler induced on cross-examination. The missing evidence is not a restatement of the general proposition of A.L.'s untrustworthiness or the inconsistencies already raised. *Cf. Hartman v. Bagley*, 492 F.3d 347, 361 (6th Cir. 2007) (holding no prejudice where petitioner's main argument is only "contentions that counsel failed to expand on or corroborate or fully develop the factors listed in" his psychologist's report that were testified to in front of the jury). Instead, the evidence provides direct and specific challenges to her motivations (she wants to be on TV, she wants attention), her trustworthiness (she lies a lot and her friends and friends' parents confirm that she does not understand consequences of her lies), the stability of her story (the change in the EMS report, the prompting from her father), and the origins of her story (she just recently learned Ashley Snyder had been molested), each of which was not presented to the jury via Butler's cross-examinations. The inconsistencies elicited between the hospital report and her initial report also were only sins of omission, unlike the EMS report, which contains information possibly contradicting the central fact of the crime.

Moreover, Butler's attempts at impeachment all relied on the testimony of the state's witnesses and frequently were likely unconvincing because they relied only on the state's witnesses. For instance, A.L.'s admission that she "sometimes lies" is less impressive without corroboration from additional witnesses that underscore that she lies specifically to get attention and that she frequently

does not understand the consequences of her lies. *Cf. Clinkscale*, 375 F.3d at 445 (holding that corroboration evidence to defendant's alleged alibi was not cumulative because without "any corroborating witnesses [the defendant was] left . . . without any effective defense.") (internal quotations omitted). Butler's other attempts at impeachment were followed by flat rejections of the broader propositions that he tried to establish. S.L. rejected the proposition that his daughter "had a tendency to make things up." Similarly, Don Shaffer denied on cross that A.L. frequently made things up beyond "ordinary, kids fighting." The missing evidence, on the other hand, was not subject to immediate denial and so would have been less vulnerable to being discounted by the jury. *See Bigelow*, 367 F.3d at 565 (holding that additional alibi witnesses were not cumulative because of the vulnerability of the one alibi witness called).

Where, as here, the evidence that the jury did not hear provides specific impeachment evidence, we have not held it to be "cumulative" merely because other, less convincing evidence that also happened to be "impeachment evidence" was heard. *See, e.g., Brown* 551 F.3d at 434-35. And this outcome makes sense, even under the "substantial difference" standard in *Hill*: the ultimate question is not the analytical difference between the actual trial and a hypothetical one, but whether the fact of missing evidence "undermine[s] confidence in the outcome." *Strickland*, 466 U.S. at 694.

Accordingly, we hold that, in light of centrality of credibility to the prosecution's case and the strength of the missing impeachment evidence, Vasquez has demonstrated that but for his counsel's unprofessional errors there was a reasonable

probability that his trial would have had a different outcome; our confidence in the verdict is indeed undermined.

IV

For the reasons explained, Robert Vasquez received constitutionally ineffective assistance of counsel. The Ohio courts' holding decision of no prejudice was contrary to clearly established Supreme Court precedent and Vasquez is therefore entitled to the writ of habeas corpus. The judgment of the district court is AFFIRMED.

GRIFFIN, Circuit Judge, dissenting.

I respectfully dissent. I disagree with the majority's conclusions that (1) the Ohio courts applied law contrary to *Strickland v. Washington*, 466 U.S. 668 (1984), (2) our review is not constrained by AEDPA and that de novo review is appropriate, and (3) Vasquez received constitutionally ineffective assistance of counsel. In my view, the majority and the district court have engaged in an impermissible reconstruction of Vasquez's trial, failed to avoid the warping effects of hindsight, and declined to afford a strong presumption that Attorney Butler's conduct fell within the wide range of reasonable professional assistance. Accordingly, I would reverse the judgment of the district court and deny the petition for a writ of habeas corpus.

I.

As the majority concedes, the district court erred by not according proper deference to the state court's factual findings and conclusions of law under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2244. The majority concludes, however, that de novo review is

nonetheless appropriate because the Ohio courts applied law that was contrary to *Strickland v. Washington*, 466 U.S. at 668; *see Fulcher v. Motley*, 444 F.3d 791, 799 (6th Cir. 2006) (when a state court applies law that is "contrary to" clearly established federal law, a federal court is unconstrained by § 2254(d)(1) and de novo review is appropriate).

At the outset, I take issue with footnote 1 of the majority's opinion. In it, the majority elects to "focus" its *Strickland* analysis on the Ohio trial court's decision instead of the opinion rendered by the Ohio Court of Appeals. My colleagues base their decision on what they characterize as "an apparently unresolved question about the state decision a federal court should defer to under AEDPA[,]" namely, the majority queries whether an appellate court decision, governed by an abuse-of-discretion standard, constitutes "an adjudicat[ion] on the merits" under AEDPA. 28 U.S.C. § 2254(d) (a federal court shall not grant the writ "with respect to any claim that was adjudicated on the merits in State court proceedings unless . . . .").

However, it is well-established that a federal court reviewing a habeas petition should examine the decision of the last state court "to [render] a reasoned opinion on the issue[.]" *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005), *cert. denied*, 548 U.S. 908 (2006); *see Davie v. Mitchell*, 547 F.3d 297, 315 (6th Cir. 2008); *Joseph v. Coyle*, 469 F.3d 441, 450 (6th Cir. 2006). Nonetheless, the majority contends that:

> [w]here an appellate court reviews under an "abuse of discretion" standard, it is not adjudicating the merits of the claim so much as the merits of the decision under review. The question is only whether it fell into what

> is presumably a broad band of discretion. AEDPA, however, is meant to secure deference to the application of federal law by a state court in its "adjudicat[ion] on the merits" of a petitioner's claim. 28 U.S.C. § 2254(d). Accordingly, AEDPA perhaps does not have anything to say about a state court's decision that another state court did not abuse its discretion – it is concerned only with whether the *actual* adjudication of the merits of petitioner's claim was contrary to, or an unreasonable application of, federal law.

In "focus[ing]" its analysis almost exclusively on the Ohio trial court opinion, the majority relies on *Benge v. Johnson*, 474 F.3d 236 (6th Cir. 2007) as authority. In *Benge*, the Ohio Supreme Court analyzed the effect of an unobjected-to jury instruction in the context of plain-error analysis, not under the governing, and less burdensome, *Strickland* standard. We held that "[b]ecause Benge could have met his burden under *Strickland*[,] despite not being able to demonstrate plain error, [the Ohio Supreme Court's] analysis did not constitute an 'adjudication on the merits' of Benge's ineffective-assistance-of-counsel claim." *Benge*, 474 F.3d at 246. Indeed, the Ohio Supreme Court's analysis was extremely limited and consisted of only two sentences, holding that "even if the jury instruction is deemed improper, such an error will not mandate reversal unless it constitutes plain error. In other words, we must determine whether 'but for the error, the outcome of the trial clearly would have been otherwise.'" *State v. Benge*, 661 N.E.2d 1019, 1025 (Ohio 1996). The Ohio Supreme Court neither mentioned *Strickland* nor the Sixth Amendment when disposing of petitioner's ineffective assistance of counsel claim.

In *Danner v. Motley*, 448 F.3d 372 (6th Cir. 2006), we reached a similar conclusion. In our review of petitioner's asserted *Strickland* error, there was "no indication in the trial court's comments that it examined Danner's Sixth Amendment claim. Nor [was] there evidence in the Kentucky Supreme Court's opinion that it considered the Sixth Amendment at all in ruling on Danner's claim." *Danner*, 448 F.3d at 376. We noted in *Danner* that "[a]ny consideration of the Sixth Amendment contained within the state case law upon which the state courts relied is too attenuated to consider the Sixth Amendment claim to have been 'adjudicated on the merits.'" *Id.*

Our decisions in *Benge* and *Danner* were primarily concerned with the state court's cursory treatment of the petitioner's *Strickland* claims and are therefore harmonious with the rule stated in *Payne* and *Davie* – we must review "the last state court [decision] to [render] a *reasoned* opinion on the issue[.]" *Payne*, 418 F.3d at 660 (emphasis added). Unlike the state court decisions in *Benge* and *Danner*, the state appellate court opinion in the present case engaged in reasoned and comprehensive analysis of Vasquez's claims under *Strickland*. This case is readily distinguishable from *Benge* and *Danner* because those decisions completely overlooked *Strickland*. The concerns addressed in the *Benge* and *Danner* decisions are simply not implicated here.

Thus, I respectfully disagree with the majority's approach and its characterization of *Benge* and *Danner*. I would adhere to the rule established by *Payne* and *Bell* and review the Ohio Court of Appeals decision because it was "the last state court

to [render] a reasoned opinion on the issue." *Payne*, 418 F.3d at 660 (6th Cir. 2005).

II.

Next, the majority concludes that the Ohio courts applied law contrary to *Strickland v. Washington* by allegedly elevating the burden of persuasion necessary to sustain Vasquez's ineffective assistance of counsel claim. The majority thereafter launches into de novo review, reconstructing the state court trial record, analyzing "cold" post-conviction hearing testimony, and eventually holding that Vasquez is entitled to habeas relief.

In *Williams v. Taylor*, 529 U.S. 362, 386 (2000), the Supreme Court emphasized our limited role under AEDPA in adjudicating claims of state prisoners:

> [I]t seems clear that Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ . . . . [F]ederal habeas courts must make as the starting point of their analysis the state courts' determinations of fact, including that aspect of a "mixed question" that rests on a finding of fact. AEDPA plainly sought to ensure a level of "deference to the determinations of state courts," provided those determinations did not conflict with federal law or apply federal law in an unreasonable way. H.R. Conf. Rep. No. 104-518, p. 111 (1996). Congress wished to curb delays, to prevent "retrials" on federal habeas, and to

> give effect to state convictions to the extent possible under law. When federal courts are able to fulfill these goals within the bounds of the law, AEDPA instructs them to do so.

The *Strickland* prejudice standard requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Here, the majority holds that the Ohio trial court's decision was contrary to *Strickland* because its opinion states that prejudice occurs when "the result of petitioner's trial or legal proceeding *would have been different* had defense counsel provided proper representation." (Emphasis added.)[1] According to the majority, the trial court's omission of the words "reasonable probability" in its recitation of the prejudice standard resulted in its application of a different, more demanding measure of proof. Also, the majority notes that the Ohio Court of Appeals correctly articulated the *Strickland* prejudice standard, but later omitted the words "reasonable probability" in its discussion. My colleagues claim that the appellate court's accurate recitation of the law neither cured the trial court's alleged error nor evidenced the appellate court's application of the proper burden of proof. I disagree.

In *Williams*, the Supreme Court defined AEDPA's "contrary to" clause: "The word 'contrary' is

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[1] Most of the district court's opinion focuses on its conclusion that the Ohio courts unreasonably applied *Strickland*. In contrast, the majority's opinion concludes that the Ohio courts violated the "contrary to" clause, and thereafter engages in de novo review of petitioner's ineffective assistance of counsel claim.

commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" 529 U.S. at 405 (quoting Webster's Third New International Dictionary 495 (1976)). "The text of § 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court." *Id.*; *Ivory v. Jackson*, 509 F.3d 284, 291 (6th Cir. 2007) ("state-court decision is considered 'contrary to . . . clearly established federal law' if it is 'diametrically different, opposite in character or nature, or mutually opposed.'") (citation omitted).

In interpreting § 2254(d), the Court employed the following example of an application of law that is "contrary to" clearly established federal law:

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a *preponderance of the evidence* that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a reasonable probability that . . . the result of the proceeding would have been different."

Williams, 529 U.S. at 405-06 (citing *Strickland*, 466 U.S. at 694) (emphasis added).

In the present case, to accept the majority's position, a federal judge must conclude that the

omission of the words "reasonable probability"[2] from the state courts' description of Strickland's prejudice standard resulted in an application of a "diametrically different" burden of persuasion. Such a conclusion is not supported by the facts and the law.

In *Woodford v. Visciotti*, 537 U.S. 19, 23-24 (2002) (per curiam), the Supreme Court held that a state court's "occasional shorthand reference" to the *Strickland* prejudice standard "may perhaps be imprecise," but it is not a repudiation of the standard that results in a decision that is contrary to clearly established federal law. In *Visciotti*, the Court reversed the Ninth Circuit's decision that had held that a state court's use of the word "probable" was a standard of prejudice contrary to *Strickland*:

> The Court of Appeals made no effort to reconcile the state court's use of the term "probable" with its use, elsewhere, of *Strickland*'s term "reasonably probable," nor did it even acknowledge, much less discuss, the California Supreme Court's proper framing of the question as whether the evidence "undermines confidence" in the outcome of the sentencing proceeding. This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law. *See, e.g., Parker v. Dugger*, 498 U.S. 308, 314-316 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), overruled on other grounds, *Ring v. Arizona*, 536 U.S. 584 (2002); *LaVallee v. Delle Rose*, 410 U.S.

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[2] As previously noted, the Ohio Court of Appeals recited the correct *Strickland* standard, verbatim, at the beginning of its opinion.

> 690, 694-695 (1973) (per curiam). It is also incompatible with § 2254(d)'s "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), which demands that state-court decisions be given the benefit of the doubt.

Visciotti, 537 U.S. at 24 (emphasis added). The *Visciotti* opinion also suggests that a state court's accurate citation of *Strickland* evidences its application of the proper burden of proof. *Visciotti*, 537 U.S. at 22. Here, both state court decisions either correctly cite to *Strickland* or articulate the proper burden of persuasion standard.

Moreover, the Supreme Court has reversed our circuit on grounds substantially similar to the position espoused by the majority. In *Jackson v. Holland*, 80 F. App'x 392 (6th Cir. 2003) (unpublished), *rev'd* 542 U.S. 649 (2004) (per curiam), we had held that a state court's use of language at odds with *Strickland* evidenced its application of an elevated burden of proof:

> Although the [state] court initially quoted the "reasonable probability" language of *Strickland*, it immediately followed this statement with language that "[i]n a post-conviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence." The [state] court later stated "it is asking too much that we draw the inference that the jury *would not have believed* Hughes at all had Melissa Gooch testified." Furthermore, the state court concluded that Jackson "failed to carry his burden of proving that the outcome of the trial *would probably have been different* but for those errors.[6]

> [6]In evaluating [petitioner's] contention that the lower court should have reopened the proof in the collateral proceeding to allow Melissa Gooch to testify, the Tennessee Court of Appeals also stated that Gooch's statement "does not lead to the conclusion that the jury *would have decided the case differently* had it heard Gooch testify."

* * *

> Even keeping mindful of the deferential gaze that we must cast upon the Tennessee Court of Criminal Appeals's decision, we must conclude that the state court merely paid lip service to *Strickland*'s reasonable probability standard before imposing an inappropriately stringent burden upon [petitioner]. Other than the initial articulation of the *Strickland* standard, there is absolutely no evidence that the state court analyzed Petitioner's claim under the proper "reasonable probability" standard. Indeed, all evidence within the opinion is to the contrary.

Jackson, 80 F. App'x at 407, n.6, 409 (emphasis in original) (internal quotation and citation omitted).

The Supreme Court reversed, *Holland v. Jackson*, 542 U.S. 649, 654-55 (2004) (per curiam), holding that the state court's initial recitation of the correct *Strickland* standard sufficiently established that it understood and applied the proper burden of proof, notwithstanding its "shorthand" references to it throughout the remainder of its opinion:

The Sixth Circuit also erred in holding that the state court acted contrary to federal law by requiring proof of prejudice by a preponderance of the evidence rather than by a reasonable probability. The state court began by reciting the correct *Strickland* standard:

> "'[T]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" App. to Pet. for Cert. 95 (quoting *Strickland*, 466 U.S., at 694).

The Sixth Circuit nevertheless concluded that the state court had actually applied a preponderance standard, based on three subsequent passages from its opinion.

First was the statement that "[i]n a post-conviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence." App. to Pet. for Cert. 95. In context, however, this statement is reasonably read as addressing the general burden of proof in postconviction proceedings with regard to factual contentions – for example, those relating to whether defense counsel's performance was deficient. Although it is possible to read it as referring also to the question whether the deficiency was prejudicial, thereby supplanting *Strickland*, such a reading would needlessly create internal inconsistency in the opinion.

> Second was the statement that "it is asking too much that we draw the inference that the jury would not have believed Hughes at all had Melissa Gooch testified." App. to Pet. for Cert. 96. Although the Court of Appeals evidently thought that this passage intimated a preponderance standard, it is difficult to see why. The quoted language does not imply any particular standard of probability.
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> Last was the statement that respondent had "failed to carry his burden of proving that the outcome of the trial would probably have been different but for those errors." *Id.*, at 98. We have held that such use of the unadorned word "probably" is permissible shorthand when the complete *Strickland* standard is elsewhere recited. *See Woodford v. Visciotti*, 537 U.S. 19, 23-24 (2002) (*per curiam*).
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> As we explained in *Visciotti*, § 2254(d) requires that "state-court decisions be given the benefit of the doubt." *Id.* at 24. "[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Ibid.* The Sixth Circuit ignored those prescriptions.
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> * * *
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> The judgment of the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Id.; *see also Urban v. Ohio Adult Parole Auth.*, 116 F. App'x 617, 627 (6th Cir. 2004) (unpublished) (discussing *Visciotti* and *Jackson* and rejecting petitioner's argument that a state court's shorthand description of *Strickland*, specifically, its statement that the "outcome probably would have been

different," resulted in its application of an elevated burden of proof under *Strickland*).

In the present case, it is undisputed that the Ohio Court of Appeals began its opinion by articulating the correct *Strickland* burden of persuasion standard. In the words of Judge Karpinski, writing for the Court of Appeals of Ohio, Eighth District:

> A defendant must demonstrate that trial counsel's performance fell below the objective standard of reasonable competence under the circumstances and that there exists a reasonable probability that, but for such deficiency, the outcome of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373.

State v. Vasquez, No. 82156, 2004 WL 35766, at *3 (Ohio Ct. App. Jan. 8, 2004). The court of appeal's citation to *State v. Bradley* is significant because in it, the Ohio Supreme Court accurately followed and applied the "reasonable probability" prejudice standard of *Strickland*. *Bradley*, 538 N.E.2d at 380.

The concluding paragraphs of Judge Karpinski's reasoned opinion on this ineffective assistance of counsel claim are consistent with the law of *Strickland*, although the words "reasonable probability" are not reiterated:

> During his post-conviction hearing, defendant presented numerous witnesses who did not testify at his trial. Their absence, however, does not demonstrate his counsel was ineffective and that the outcome of his trial would have been different had they been witnesses during his trial.

> On the contrary, the record shows that none of defendant's witnesses offered any testimony to support defendant's theory of innocence. None of their testimony challenges the victim's account of the events leading to defendant's convictions. We agree with the trial court's conclusion that "not one of the witnesses who testified–neither the defendant, his family or others–offered any testimony that could have changed the outcome of defendant's trial." Trial Court Findings of Fact and Conclusions of Law, p. 25.

Vasquez, 2004 WL 35766, at *6.

Nonetheless, my colleagues conclude that, based on shorthand language used in the opinion, the Ohio Court of Appeals applied law that was contrary to *Strickland v. Washington*. I disagree.

In reaching this conclusion, the majority makes no concerted effort to distinguish the present case from *Visciotti* or *Jackson*. This is untenable given the substantially similar imprecise or shorthand language employed by the state court in *Jackson*, which arguably misdescribed *Strickland*'s burden of proof. *Jackson*, 80 F. App'x at 407.

Also, the majority reasons that because the state trial court opinion consistently omits the words "reasonable probability," such an omission creates a stronger inference of a heightened standard of proof than an opinion that correctly recites the standard once and thereafter misdescribes it.[3] However, the

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[3] Because the majority focuses its analysis on the state trial court opinion, it is necessary for me to address the trial court's omission of the words "reasonable probability" instead of reviewing only the appellate court's decision.

state trial court opinion accurately cites both *Strickland* and *State v. Bradley*; *see Visciotti*, 537 U.S. at 22 (suggesting that a state court decision's accurate citation to *Strickland* indicates that it knows the law and the applicable burden of proof).

Under *Visciotti* and *Jackson*, the state court opinions employed permissible shorthand language describing Strickland's prejudice standard, which did not result in their application of a "diametrically different" burden of proof under *Williams*. *See Visciotti*, 537 U.S. at 24; *Jackson*, 542 U.S. at 654; *Williams*, 529 U.S. at 405-06; *Urban*, 116 F. App'x at 627. The majority's "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law. It is also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings' . . . which demands that state-court decisions be given the benefit of the doubt." *Visciotti*, 537 U.S. at 24 (emphasis added) (citation omitted).

For these reasons, I respectfully disagree with the majority's conclusion that the Ohio courts applied law contrary to *Strickland v. Washington*. The majority has made a fundamental error. Our review of Vasquez's petition for a writ of habeas corpus should be constrained by AEDPA deference, not de novo.

III.

The final issue is whether the Ohio Court of Appeals unreasonably applied *Strickland* to the facts. 28 U.S.C. § 2254(d)(1). I concur with the majority opinion insofar as it holds that Vasquez cannot base his ineffective assistance of counsel argument on his failure to investigate Karra Vasquez and JoAnn Kitchen. Again, pursuant to

Payne and *Davie*, my analysis focuses on the state appellate court opinion because it is the last state court to render a reasoned decision on this claim.

A state court decision unreasonably applies federal law "if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts." *Irick v. Bell*, 565 F.3d 315, 320 (6th Cir. 2009) (internal quotation omitted). "[A] federal habeas court may not issue a writ under the unreasonable application clause 'simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Id.* (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002) (internal quotation and citation omitted)). "[T]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect[,] but whether that determination was unreasonable – a substantially higher threshold." *Irick*, 565 F.3d at 320 (quoting *Owens v. Guida*, 549 F.3d 399, 404 (6th Cir. 2008) (internal quotation and citation omitted)). After assuming my proper role, I would hold that the Ohio courts did not unreasonably apply *Strickland*.

For Vasquez to succeed on a claim for ineffective assistance of counsel, he must satisfy the well-rehearsed two-prong *Strickland* test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing

> that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

> Moreover:
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> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . Because of the difficulties inherent in making the evaluation, a court must indulge a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action *might be* considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689 (internal quotation and citation omitted; emphasis added).

This high level of deference means that "[w]e address not what is prudent or appropriate, but only what is constitutionally *compelled*." *United States v. Cronic*, 466 U.S. 648, 665, n.38 (1984) (emphasis added). In addition, "'[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete

investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Barnes v. Elo*, 231 F.3d 1025, 1029 (6th Cir. 2000) (quoting *Strickland*, 466 U.S. at 691).

At the state court level, Vasquez's ineffective assistance of counsel claim challenged Butler's exclusion of certain family members as potential defense witnesses. Because I agree with the majority that Vasquez cannot base his ineffective assistance of counsel claim on the exclusion of Karra Vasquez and JoAnn Kitchen, my analysis focuses solely on Butler's performance regarding Becky Shaffer. Thus, if Butler's decision to exclude Becky Shaffer from his potential defense witnesses was, as the Ohio courts concluded, based on reasoned trial strategy and judgment, the issue is resolved.

The Ohio Court of Appeals concluded that "the record shows that none of defendant's witnesses offered any testimony to support defendant's theory of innocence. None of their testimony challenges the victim's account of the events leading to defendant's convictions. We agree with the trial court . . . ." In reaching its conclusion, the appellate court relied on the following findings of fact set forth in the state trial court decision:

> Butler testified that after he was assigned to the case about six weeks after arraignment, he reviewed the Court's file, the clerk's office docket, met with his client, ascertained that his client would not sign a speedy trial waiver pursuant to the Court's concern about time, and proceeded immediately to conduct research and prepare for trial. Butler filed the appropriate discovery motions [and] met with his client at subsequent scheduled pre-trials.

* * *

> Butler explained that he didn't subpoena the family members because they were uncooperative and he had to keep in mind the other allegations of sexual molestation, members would be aware of the rape allegation by [Vasquez's] four-year-old niece in California.

* * *

> The defendant testified that while in County Jail, even he could not reach his wife, his sister-in-law Becky [Shaffer] or his mother-in-law, JoAnn Kitchen: none of them responded [and] [h]is wife stopped visiting him.

* * *

> "Becky" Shaffer testified [that] she and her husband had gone to bed and did not see the [victim or her mother and father] the night [the victim] stated that Robert Vasquez raped her.
>
> [Becky Shaffer] also suspected [Vasquez] of sexually abusing her son.

Pursuant to 28 U.S.C. § 2254(e)(1), the district court is required to apply a presumption of correctness to state court findings of fact unless the petitioner offers clear and convincing evidence rebutting this presumption. *See Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998). In its review of Vasquez's habeas petition, the district court abandoned this presumption and did not circumscribe its analysis to comport with AEDPA deference.

In fact, the district court's opinion challenged only one finding of fact upon which the state appellate court relied, specifically, the fact that "[Becky Shaffer] suspected or was concerned that Vasquez had sexually abused [her son.]" The district court found that "Becky Shaffer [actually] testified that she took her son Aaron to the hospital on the night of August 4, 2000, because Steve Loomis and 'the other police officer' [Zbikowski] told her to do so, [] not because she suspected or was concerned that Vasquez had sexually abused [her son.]" *Id.* The district court further noted that:

> [a] closer analysis of Becky's testimony [] makes this finding a significant stretch, if not an outright mischaracterization. This is especially so when considering the convoluted cross-examination questioning involving multi-part questions that elicited a "yes" and Becky's repeated testimony that she only took her son in the ambulance because Steve Loomis and another police officer directed her to do so.

A review of the post-conviction hearing transcript, however, does not rebut the state appellate court's reliance upon this factual finding by clear and convincing evidence. The post-conviction transcript contains the following colloquy between the trial court, Vasquez's counsel, and Becky Shaffer (during Shaffer's cross-examination):

> THE COURT: Ma'am, did you tell the hospital personnel the reason you were there [at the hospital] was because [A.L.] had made the allegation –
>
> BECKY SHAFFER: Yes.

THE COURT: – of rape and you wanted to see whether or not your son had been abused?

BECKY SHAFFER: Yes.

VASQUEZ'S COUNSEL: I'm sorry, What was your answer?

THE COURT: She said yes.

VASQUEZ'S COUNSEL: Thank you very much.

* * *

VASQUEZ'S COUNSEL: You said this is an emotional situation, correct?

BECKY SHAFFER: Yes.

VASQUEZ'S COUNSEL: So obviously this is a very serious situation?

BECKY SHAFFER: Very.

VASQUEZ'S COUNSEL: And you suspected that the same thing might have happened to your son, that's how serious it was.

BECKY SHAFFER: I didn't know. Yes.

Moreover, the remaining factual findings relied upon by the state appellate court remained uncontroverted by the district court.[4] Specifically,

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[4] Attorney Butler was appointed to represent Vasquez approximately six weeks before his trial. On the same day that he was appointed, Butler met with Vasquez and asked him to execute a speedy trial waiver. Vasquez refused. Butler filed appropriate discovery requests, researched and prepared for trial, and met with Vasquez on several occasions. Butler decided to exclude Becky Shaffer because she was not present at the time the alleged rape occurred (she was asleep in a separate apartment, two floors above the basement level, which

there is ample evidence supporting the appellate court's decision to affirm the state trial court's ruling that Vasquez's family members, including Becky Shaffer, were uncooperative and unsympathetic to his defense. Butler's decision to forgo contacting Becky Shaffer is not so "incredible" amid swirling family-based allegations of spousal abuse and separate family-based allegations of sexual molestation. In addition, Becky Shaffer was slated to testify for the prosecution. Moreover, during the post-conviction hearing, Becky Shaffer admitted that she suspected that Vasquez had sexually abused her son, a damning accusation if revealed during his rape trial, and arguably evidencing Butler's reasonable fears about Vasquez's family's proclivity for damaging and harmful testimony.

The majority claims that Butler knew that "Becky Shaffer was ideally situated to provide information on the only avenue of defense available to Vasquez" and that she was likely to have "relevant information." The majority also asserts that Butler could have contacted Becky Shaffer independently. These statements are speculative. Furthermore,

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was the alleged crime scene), she was a close family member (Vasquez was married to her sister), and that Butler was concerned that Vasquez's family members would testify or reveal details about the separate molestation allegations levied by Vasquez's niece in California. When Butler eventually reached JoAnn Kitchen, she informed him that the family "w[as] not going to cooperate [] [] in any way" with his defense, and that she had recently learned that Vasquez had been abusing her daughter (Vasquez's wife, Karra) for "an extended period of time." During this same six-week period, Vasquez testified that he had been "abandoned by his family," including the same family members the majority now contends could have aided in his defense. Vasquez made several attempts to contact Becky Shaffer, but she never responded.

according to Vasquez's own testimony, credited by the state trial court, he had been "abandoned by his family" during the six weeks before his trial and had made several attempts to contact Becky Shaffer, but to no avail. Vasquez's concern regarding his family's abandonment appropriately influenced Butler's reasoned and strategic decision not to pursue certain defense witnesses, including Becky Shaffer.

As the Supreme Court has stated:

> [t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends *critically* on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. *And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful*, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691 (emphasis added).

The district court and majority rely heavily on *Ramonez v. Berghuis*, 490 F.3d 482, 484 (6th Cir. 2007) in support of their conclusion that in making his decision regarding Becky Shaffer, Butler was not functioning as the counsel guaranteed by the Sixth

Amendment. In *Ramonez*, however, the excluded defense witnesses actually *witnessed* the altercation that gave rise to the defendant's conviction. *Ramonez*, 490 F.3d at 488 (concluding that attorney's decision to exclude defense witnesses was constitutionally deficient because defendant insisted "months before trial" that the three witnesses at issue could testify to what they saw when they witnessed the altercation, and that each witness could testify that defendant did not force his way into the victim's home). Here, however, Becky Shaffer did not witness the crime. In fact, there were no witnesses to the alleged crime other than A.L. and Vasquez. Becky Shaffer's favorable testimony, if any, would be limited to impeachment, only. Thus, *Ramonez* is easily distinguishable from the present case.

The majority also holds that Butler was ineffective in failing to pursue potential impeachment evidence contained in an Emergency Medical Services report form (EMS run sheet). The hearsay evidence contained in the EMS report can be summarized as follows: When A.L. described the attack to the paramedics, she allegedly stated that "he put it in." The EMS run sheet also reports that A.L. "took a shower later that day."

The state appellate court did not rule on this issue, and the record does not reveal whether this claim was abandoned on appeal. Nonetheless, the state trial court decision (the last state court to render a reasoned decision on this matter) ruled that Butler's failure to impeach A.L. with the EMS run sheet did not prejudice Vasquez's defense because "it was consistent with her trial testimony." In its finding of facts, the state trial court found as follows:

(B) Claim that Counsel Did Not Cross-examine Victim Regarding EMS "Run Sheet":

> At the hearing, Butler was presented with an unauthenticated copy of an Emergency Medical Services "run report" of the evening that [A.L.] was transported to the hospital. The defendant asked questions of Butler concerning the fact that an unidentified person wrote thereon: "pt. st. he put it in her." Apparently defendant was attempting to show, as he claimed via his Investigator's affidavit in his Supplement, that this notation "is in complete contradiction to [A.L.'s] trial testimony". Tom Pavlish's Affidavit at para. 4. Butler testified that his understanding of this case was that it was oral sex, more specifically, that [A.L.] accused the defendant of putting his tongue in her – he had no information that it was anything else.

The majority contends, however, that this conclusion is not a factual finding entitled to deference under § 2254(e)(1) because "this [] reasoning is actually a holding that Vasquez has not carried his burden to show prejudice resulting from his attorney's failure to identify the run sheet as useful impeachment evidence." I disagree. The trial court's finding was based in part on its determination that A.L.'s trial testimony was consistent with her EMS run sheet statements. At the very least, it is a mixed question that rests on a finding of fact, which is entitled to AEDPA deference. *See Williams*, 529 U.S. at 389.

To establish prejudice, Vasquez "must show that there is a reasonable probability that, but for [Butler's failure to discover this impeachment evidence], the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In addition, AEDPA deference requires that we review the state trial court's decision for "unreasonable[ness] – a substantially higher threshold." *Irick*, 565 F.3d at 320 (quoting *Owens*, 549 F.3d at 404) (internal quotation and citation omitted).

I disagree with the majority's holding that Butler's failure to impeach A.L. with the information contained in the EMS run sheet creates a reasonable probability that but for his failure to do so, the result of his trial would have been different. *See Strickland*, 466 U.S. at 694. A.L.'s statements, as reflected in the EMS run sheet, do not contradict her trial testimony. A.L. testified at trial that Vasquez "lick[ed] [her] private spot . . . [with] his tongue," and answered "both" when asked on direct examination whether he had touched her on "the inside or outside or both." Thus, her statement that "he put *it* in" is consistent with her trial testimony.[5]

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[5] Vasquez also argues that Attorney Butler was constitutionally ineffective for failing to cross-examine A.L. regarding an ambiguous notation in the EMS run sheet, that she "took a shower later that day." In its finding of facts, the state trial court found as follows:

> Mr. Pavlish states in his affidavit that information in the EMS report also states "pt. st. she took a shower later that day" is inconsistent with Stephen Loomis's testimony that "immediately after the incident [A.L.] fell asleep in his truck during the drive home and that

As we have explained, "in order to establish prejudice, the [] evidence . . . must differ in a substantial way – in strength and subject matter – from the evidence actually presented . . . ." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005). As the majority concedes, Butler repeatedly impeached A.L. and other state witnesses concerning A.L.'s trustworthiness and ability to tell the truth.

Most importantly, after according proper AEDPA deference, I do not agree that the Ohio courts unreasonably applied *Strickland* to the facts. Butler's conduct regarding Becky Shaffer was "reasonable precisely to the extent that [his] reasonable professional judgment[] support[ed] th[at] limitation[] on [his] investigation[,]" *Strickland*, 466 U.S. at 691, and the EMS run sheet does not contain impeachment evidence that is substantially different in strength and subject matter from the impeachment evidence presented at trial. *Hill*, 400 F.3d at 318-19.

"The question under AEDPA is not whether a federal court believes the state court's determination

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> he carried her into his home as she slept." Tom Pavlish Affidavit at para. 6. At the hearing, counsel asked Butler questions concerning this notation, to which Butler replied that the night [A.L.] was transported, she had reported an incident that took place two weeks prior.

The potential impeachment of A.L. regarding this collateral matter is only marginally relevant to the issue of whether the sexual molestation occurred. For this reason, it is not "reasonably probable" that the outcome of the trial would have been different had this collateral impeachment occurred. Most importantly, the more demanding standard of an unreasonable application of *Strickland* is clearly not met.

was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Here, the Ohio state court decisions were *not* unreasonable.

In conclusion, the following comments by the Ohio trial court judge to Vasquez regarding the performance of his attorney are illuminating:

> Based upon the fact that I had to sit through this trial just like everybody else did, it's probably one of the most depressing things I had to do in the last eight years, quite frankly. I'm not looking forward to saying that my last trial was probably my worst, but I think you[r] attorney did everything he could to try to convince the jury that you weren't guilty as charged. I think Mr. Butler didn't have a lot to work with.

IV.

For these reasons, I respectfully dissent. I would reverse the judgment of the district court and deny the petition for a writ of habeas corpus.

APPENDIX C

No. 1:05 CV 1684

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT S. VASQUEZ,

Petitioner,

v.

MARGARET BRADSHAW, Warden

Respondent,

Filed: October 3, 2007
Judge Dan Aaron Polster

MEMORANDUM OF OPINION AND ORDER

Before the Court is the Report and Recommendation of Magistrate Judge George J. Limbert ("R&R") (ECF No. 35). Pending is the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By A Person In State Custody, filed by Petitioner Robert S. Vasquez[1] (the "Petition") (ECF No. 1). For the following reasons, the Court declines to adopt the R&R and CONDITIONALLY GRANTS the writ.

I. PROCEDURAL BACKGROUND

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[1] Petitioner shall be referred to as "Vasquez" or "Petitioner" throughout this Opinion.

On December 18, 2000, Vasquez was sentenced to life imprisonment for his conviction on a rape charge. (ECF No. 31-4, Ex. 3, Judgment Entry.) He was also sentenced to nine years' imprisonment, to run concurrently, for his conviction on a kidnapping charge. (*Id.*) Vasquez was represented at trial and at sentencing by attorney Donald Butler. On March 7, 2000, more than one month after the expiration of his time for filing a direct appeal, Vasquez filed a *pro se* notice of appeal of his conviction. (ECF No. 31-5, Ex. 4, Notice of Appeal.) On March 21, 2001, newly-appointed appellate counsel Norm Incze filed a motion for leave to file a delayed direct appeal. (ECF No. 31-6, Ex. 5, Motion for Leave to File Delayed Appeal.) On April 6, 2001, attorneys Mark Marein and Steven Bradley (new counsel retained by Vasquez's family) filed another motion for leave to file delayed direct appeal. (ECF No. 31-7, Ex. 6, Motion for Order Granting Leave of Court File Delayed Appeal Instanter.) The Ohio Court of Appeals granted Vasquez leave to file a delayed direct appeal on April 12, 2001. (ECF No. 31-8, Ex. 7, Journal Entry.) After receiving the parties' briefs, the appellate court affirmed the convictions in a decision issued November 1, 2001. (ECF No. 31-12, Ex. 10, Journal Entry and Opinion. *See also, State v. Vasquez*, No. 79319, 2001 WL 1352781, 2001 Ohio App. LEXIS 4910 (Ohio Ct. App. Nov. 1, 2001).) Vasquez did not appeal this decision to the Ohio Supreme Court.

On July 23, 2001, while his direct appeal was pending in the Ohio Court of Appeals, attorneys Marein and Bradley filed a motion for leave to file a motion for new trial in the Court of Common Pleas. (ECF No. 31, Ex. 11, Motion for Leave to File New Trial Motion Instanter (previously filed at ECF No.

13).) The trial court (Judge Robert Glickman[2]) granted leave to file a motion for new trial. (ECF No. 31-13, Ex. 12, Journal Entry.) One week later, the trial court vacated its order and held the motion for leave in abeyance until the Ohio Court of Appeals ruled on Vasquez's appeal. (ECF No. 31-14, Ex. 13, Journal Entry.)

While his direct appeal was pending, attorneys Marein and Bradley also filed a petition for post-conviction relief in the trial court, accompanied by affidavits from witnesses Vasquez claimed would have testified at trial had attorney Butler investigated the case properly. (Post-Conviction Hearing Findings, at 1-2.) These affiants/would-be witnesses included Ms. Tammy Salopek; Ms. Ashley Snyder; Ms. Joanne Kitchen; Ms. Becky Shaffer (nee Egbertson[3]) ("Becky Shaffer" or "Becky"); and Ms. Karra Vasquez ("Karra Vasquez" or "Karra"[4]).[5] (ECF

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[2] Judge Frank D. Celebrezze, Jr., who presided over the trial and sentencing, was no longer sitting on the Cuyahoga County Court of Common Pleas, having been elected to the Ohio Court of Appeals, Eighth Appellate District in November of 2000.

[3] At the time of the alleged incident and subsequent trial, Becky's last name was Egbertson, and she was engaged to be married to Don Shaffer. Don and Becky married in February of 2001, at which point Becky took Don's last name and became Becky Shaffer, which was her name at the time of the postconviction hearing. For simplicity's sake, the Court will refer to Becky Shaffer rather than Becky Egbertson throughout this Opinion.

[4] Ms. Vasquez's name is spelled differently throughout the Record, sometimes as "Karra" and spelled "Kara" at other times. The Court uses "Karra" in this Opinion, as that is the spelling used in the postconviction hearing transcript.

[5] Though Vasquez's initial petition for post-conviction relief only listed Karra Vasquez and Kitchen, Vasquez later filed, with leave of court, a supplemental memorandum that added

No. 31-15, Ex. 14, Petition for Post-conviction Relief.) On May 14-17, 2002, Judge Glickman held a hearing on both the petition for post-conviction relief and the motion for new trial, at which the affiants testified. (ECF No. 31, Exs. 37-38.) Butler and Vasquez also testified.[6] (*Id.*) After additional briefing by the parties, the court denied both the petition and the motion for leave to file a motion for new trial. (ECF Nos. 31-37, Ex. 23; 31-38, Ex. 24; 31-39, Ex. 25.) (The testimony presented at the post-conviction hearing is addressed later in this Opinion.)

Represented again by attorneys Marein and Bradley, Vasquez appealed the denial of his post-conviction petition to the Ohio Court of Appeals. (ECF No. 31-40, Ex. 26.) The appellate court affirmed the trial court's denial of Vasquez's post-conviction petition. (ECF No. 31-53, Ex. 30, Journal Entry and Opinion; see also ECF No. 31-54, *State v. Vasquez*, No. 82156, 2004 WL 35766, 2004 Ohio 53; 2004 Ohio App. LEXIS 47 (Ohio Ct. App. Jan. 8, 2004).)

Represented anew by attorney Karl Rissland, Vasquez appealed the decision of the Ohio Court of Appeals to the Ohio Supreme Court. (ECF No. 31-

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the additional witnesses. (Post-Conviction Hearing Findings, at 1.)

[6] Vasquez also called Ms. Sally McHugh and Mr. Richard Lillie as witnesses. McHugh denied in her testimony that she threatened to remove Karra Vasquez's children from the home if she cooperated with her husband's defense. (Hr'g Tr. 402:17-21.) The State also called witnesses James Chappelle and Officer Timothy Zbikowski.

The relevant testimony for purposes of the instant petition, however, is the testimony given by Tammy Salopek, Ashley Snyder, Joanne Kitchen, Becky Shaffer, Karra Vasquez, Vasquez, and attorney Butler.

55, Ex. 32.) On June 9, 2004, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (ECF No. 31-60, Ex. 36.)

On June 29, 2005, represented by attorney Gordon Friedman, Vasquez filed the instant habeas petition alleging the following four grounds for relief:

> GROUND ONE: Denial of effective assistance of [trial] counsel as guaranteed by [the] Sixth Amendment [to the] U.S. Constitution.
>
> Supporting Facts: Although Petitioner was facing a life sentence, counsel failed to adequately meet and discuss the charges. Counsel met Petitioner only three times in sessions of 15-20 minutes each.
>
> GROUND TWO: Ineffective assistance of [trial] counsel.
>
> Supporting Facts: Counsel failed to adequately investigate [the] case and interview potential witnesses, including various family members of Petitioner and individuals present at the time of the alleged crime.
>
> GROUND THREE: Ineffective assistance of [trial] counsel.
>
> Supporting Facts: Counsel failed to adequately prepare for trial. He filed only three boilerplate motions, none of which were tailored to the specific charges or facts of Petitioner's case. There was no attempt to challenge competency of minor child. No attempt to review records of Children's Services relating to victim. No Motion to Appoint Investigator in life case; no Motion for Independent Psychological Exam of Victim; No

request of ER Report; no request for EMS report.

GROUND FOUR: Ineffective assistance of [trial] counsel.

Supporting Facts: In trying case. Because of failures above, the cross-examination [of] state witnesses which led to the admission of damaging evidence relating to Petitioner that would otherwise have been inadmissible.

(ECF No. 1, Petition at 4-5.)

On November 3, 2005, Respondent filed a motion to dismiss the habeas petition as time-barred, or, in the alternative, to hold the petition in abeyance pending exhaustion of state remedies on the grounds that the petition contains both exhausted and unexhausted claims. (ECF No. 11.) Vasquez filed a brief in opposition to Respondent's motion to dismiss on December 5, 2005. (ECF No. 16.) Magistrate Judge Limbert issued an Interim Report and Recommendation on March 29, 2006. (ECF No. 17) Both parties filed Objections thereto. (ECF Nos. 18, 21.)

The Court then issued a Memorandum of Opinion and Order on June 22, 2006, declining to adopt the Interim Report and Recommendation, and granting Respondent's motion to hold the petition in abeyance, pending exhaustion of Vasquez's state court remedies. (ECF No. 23.) In the order, the Court also found that Vasquez's first and second habeas claims were exhausted, *id.* at 7, his third claim was procedurally defaulted, *id.* at 11-12, and his fourth claim was unexhausted, *id.* at 14 (incorrectly reciting that "Vasquez's third ground for relief is unexhausted.") because he had not filed a direct appeal with the Ohio Supreme Court.

Vasquez returned to state court to fully exhaust his claims by filing a motion for delayed appeal with the Ohio Supreme Court. (ECF No. 24.) On October 4, 2006, the Ohio Supreme Court denied his motion. (ECF No. 25.) Vasquez filed a notice of return to federal court on October 25, 2006. (ECF No. 26.)

Pursuant to the Court's June 22, 2006 Order, Magistrate Judge Limbert retained jurisdiction over the case for a review of the merits upon Vasquez's return to federal court. (ECF No. 23, 15.) Respondent filed a Return of Writ on January 12, 2007, ECF No. 30, accompanied by a lengthy Appendix to Return of Writ containing the entire record to that point, ECF No. 31 . After receiving an extension of time, Vasquez subsequently filed his Traverse to Return of Writ on March 5, 2007. (ECF No. 34.)

Magistrate Judge Limbert issued his Report and Recommendation on April 13, 2007, recommending that the Court dismiss the petition, on the merits as to grounds (1) and (2), and due to procedural default for grounds (3) and (4). Vasquez filed timely Objections to the R&R, ECF No. 37, and the Court ordered Respondent to respond to the Objections, to which Vasquez was ordered to file a reply, ECF No. 38. Respondent filed a response to Vasquez's Objections on June 12, 2007. (ECF No. 39.) Vasquez filed his reply on July 26, 2007. (ECF No. 41.)

II. FACTUAL BACKGROUND

Pursuant to 28 U.S.C. § 2254(e)(1), the Court "is to apply a presumption of correctness to state court findings of fact for habeas corpus purposes unless clear and convincing evidence is offered to

rebut this presumption." *Benge v. Johnson*, 474 F.3d 236, 241 (6th Cir. 2007) (*quoting McAdoo v. Elo*, 365 F.3d 487, 493-94 (6th Cir. 2004) (citations omitted)). The Court counts numerous court recitations[7] of "the facts" in the case record.[8] Notably, however, only two findings of fact serve as the basis for all the other recitations; first, the Ohio Court of Appeals' November 1, 2001 opinion on Vasquez's direct appeal (the "Direct Appeal Opinion"), and second, the Ohio Court of Common Pleas December 6, 2002 Findings of Fact and Conclusions of Law issued following Vasquez's post-conviction hearing (the "Post-conviction Hearing Findings"). The other recitations (whether nominally termed "findings" or otherwise) of fact relied in whole or in part on the findings from either or both of the above-mentioned two opinions. Consequently, any facts that, upon a closer review, appear erroneous were perpetuated in later opinions.

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[7] As opposed to "findings" of facts.

[8] See ECF No. 31, Appendix to Respondent's Return of Writ, Ex. 1 (ECF No. 31-2, Lexis version of state appeals court opinion on direct appeal affirming conviction, *State v. Vasquez*, No. 79319, 2001 Ohio App. LEXIS 4910 (Nov. 1, 2001)); Ex. 10 (ECF No. 31-12, Journal Entry and Opinion for same, Cuyahoga App. No. 79319, Nov. 1, 2001); Ex. 24 (ECF No. 31-38, Findings of Fact and Conclusions of Law after post-conviction hearing, Cuyahoga Court of Common Pleas, No. CR394976, December 8, 2002); Ex. 30 (ECF No. 31-53, Journal Entry and Opinion of state appeals court on appeals of denial of petitioner for post-conviction relief and motion for leave to file motion for new trial, *State v. Vasquez*, Cuyahoga App. No. 82156, Jan. 20, 2004 (the "Post-conviction Appeal Opinion")); Ex. 31 (ECF No. 31-54, Lexis version of same, 2004 Ohio 53, 2004 Ohio App. LEXIS 47 (Ohio App. Jan. 8, 2004)); and ECF No. 17, Interim Report and Recommendation of Magistrate Judge.

While the Court must generally defer to the factual findings of the state courts, the Court may make its own factual findings in place of "facts" that are erroneous as shown by clear and convincing evidence. *See Benge*, 474 F.3d at 241. A comprehensive review of the 800-plus pages of transcript in the record, in addition to the rest of the documents contained in the record, provides clear and convincing evidence that the facts as found in the Direct Appeal Opinion and Post-conviction Hearing Findings (and, therefore, the Post-conviction Appeal Opinion) are inaccurate in numerous places. Accordingly, the Court will cite to the trial ("Trial Tr.") and post-conviction hearing ("Hr'g Tr.") transcripts to support its conclusion that certain factual findings by the state courts are clearly erroneous.

The facts of the underlying case are as follows.

A. The Alleged Attack

On July 23, 2000, nine-year-old Ashlee Loomis ("Ashlee"[9] or "Ashlee Loomis") and her father, Steve Loomis ("Steve" or "Steve Loomis"), went to Don Shaffer's ("Don Shaffer" or "Shaffer") house to join friends in eating a late dinner. (ECF No. 31, Ex. 10, Direct Appeal Opinion, at 618.) By the time Ashlee and Steve Loomis arrived at Don Shaffer's condominium, however, it was late and Shaffer and Becky had retired for the night. (*Id.* at 619.) Vasquez, his wife Karra[10], and their two young

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[9] Ashlee Loomis should not be confused with Ashley Snyder (a friend of Ashlee Loomis, and a witness for Vasquez) or with Ashley Vasquez (the Vasquezes' daughter).

[10] Karra Vasquez is one of Kitchen's five daughters, several of whom are referenced to some degree in the record; twins Becky Shaffer and Christy Maciaszek, Karra Vasquez, Sarah, and

daughters Ashley and Renee[11] had just moved in to Don Shaffer's basement earlier that day. (ECF No. 31 Appendix to Answer/Return of Writ, Ex. 38, Hr'g Tr. at 243:12-13; 306:24–307:10.) At some point after Ashlee ate her fast food, she descended the 10-12 stairs to the basement of Don Shaffer's condo at least once. (Hr'g Tr. at 306:11-14.) Karra Vasquez and Steve Loomis were upstairs, just at the screen door that is situated at the top of the stairs that lead into the basement. (Hr'g Tr. at 305:9.) Vasquez, meanwhile, was in the basement with the two Vasquez girls, and, for a period of about five minutes, with Ashlee. (Hr'g Tr. at 302:22-25.) Approximately 15-20 minutes after Ashlee and her father arrived at Don Shaffer's, Steve Loomis called to her from the top of the stairs that it was time to go home. (Hr'g Tr. at 306:11-21.) At that point, Ashlee came up the stairs, and she and her father left for home. (*Id.*)

B. Reporting the Attack

On July 24, 2000, Ashlee and her older sister Kaylee left Cleveland to spend a week with their grandparents in Rochester, New York. (ECF No. 31, Ex. 10, Direct Appeal Opinion, at 619-20.) The girls returned home approximately a week later, or slightly longer. (ECF No. 31, Ex. 11, Motion for Leave to File New Trial Motion Instanter, Ex. 11, Trial Tr. at 127:23–128:5.) After the girls' return, Steve Loomis took them on August 4, 2000 to Don Shaffer's condo, where Kaylee babysat Ashlee, Shaffer and Becky's infant son Aaron, and the two Vasquez girls. (Trial Tr. at 205:3-10.) Later that

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Katie. (The record does not reveal Sarah's or Katie's last names.)

[11] Ashley Vasquez was approximately two years old at the time of the alleged attack, while Renee Vasquez was an infant.

day, Vasquez and Don Shaffer – who worked together at a restaurant in the Flats – arrived home from work together. (Trial Tr. at 204:18-24.) Shortly thereafter Ashlee told Shaffer that she needed to talk to him. (Direct Appeal Opinion, at 620.) She then proceeded to tell Shaffer that Vasquez had sexually assaulted her by "licking her private spot." (Trial Tr. at 206:19-20.)

Hearing Ashlee's accusation, Don Shaffer conveyed the information to Steve Loomis, who was his best friend. (Direct Appeal Opinion, at 618.) Steve Loomis, in turn, called his partner, Officer Tim Zbikowski, who quickly arrived at the condo. (Trial Tr. at 134:2-4; 134:22-135:9.) At that point, Steve Loomis and Zbikowski talked about the allegations with Ashlee. (*Id.* at 135:12.) Thereafter 911 was called, and numerous police and emergency personnel arrived. (Trial Tr. at 209:12-24.) Ashlee and Steve Loomis, accompanied by Becky Shaffer and her infant son Aaron, went by ambulance to Metro Hospital, where a physical exam was performed and Ashlee recounted her allegations. (Hr'g Tr. at 253:14-25, 257:17-25; Trial Tr. at 141:8-14.) No DNA evidence was found during the examination or during the subsequent investigation.

C. The Prosecution and Trial

1. Pre-Trial

On August 16, 2000 Vasquez was indicted, and he was arraigned on August 21, 2000. (ECF No. 31-40, Ex. 26, Notice of Appeal, Cuyahoga App. No. 82156, Trial Docket (the "Trial Docket").) Prosecutors charged Vasquez with one count of rape of a child under the age of thirteen in violation of Ohio Revised Code ("ORC") § 2907.02, and one count of kidnapping in violation of ORC § 2905.01, with a

sexual motivation specification. (Direct Appeal Opinion, at 618.)

Vasquez remained in custody from the time he was arrested. (See generally, Trial Docket.) At the August 21, 2000 arraignment, the trial court declared Vasquez indigent and appointed Attorney Pat D'Angelo as Vasquez's counsel. (*Id.*) Vasquez entered a plea of "Not Guilty" at the arraignment. (*Id.*) D'Angelo moved to withdraw from the case on September 14, 2000, which the court granted. (*Id.*) The court then appointed attorney Don Butler to represent Vasquez on the same day. (*Id.*) Butler appeared at the first scheduled pretrial, on September 21, 2000, at which he requested a continuance. (*Id.*) The court continued the matter until October 12, 2000, at which point Vasquez made his first appearance in court since he entered his "Not Guilty" plea on August 21, 2000. (*Id.*) An additional pretrial was held on October 19, 2000, at which Vasquez appeared in court as well. (*Id.*) The case proceeded to trial, which commenced on October 30, 2000, before Cuyahoga County Court of Common Pleas Judge Frank D. Celebrezze, Jr. (*Id.*)

2. Trial

The prosecution's case in chief rested entirely on Ashlee Loomis's testimony about the alleged attack, supported by Steve Loomis's testimony about Ashlee's demeanor in the time following the alleged incident. The prosecution also presented a few other witnesses, including Don Shaffer, Officer Teresa Vega, Sally McHugh ("McHugh"[12]), and Detective

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[12] After marrying in the period between trial and the post-conviction hearing, Sally's last name was changed from Weindorf – her surname during the pretrial investigation and trial – to McHugh. For purposes of consistency, the Court will

James Chappelle. These witnesses generally testified about what Ashlee had told them about the alleged incident, or what they had learned in the course of investigating the case. Prosecutors presented no DNA or other physical evidence to support the charges.

Butler's cross-examination of Ashlee Loomis was limited in scope and duration, and arguably even more damaging than helpful to Vasquez's defense; at one point Butler asked Ashlee if she kept a diary, to which Ashlee replied that she did. (Trial Tr. at 98:8-10.) Ashlee had not mentioned the diary in her direct examination, and the prosecutor had not offered it as an exhibit. Butler then asked whether Ashlee had written about the alleged incident in her diary, to which Ashlee again answered in the affirmative. (*Id.* at 98:12-16.) He pressed on to ask whether Ashlee had brought the diary to court that day, and Ashlee answered no. (*Id.* at 98:17-18.) Butler then concluded his questioning about Ashlee's diary by asking if she still had it, to which Ashlee answered yes. (*Id.* at 98:20-21.) Butler asked no other questions about the diary, nor did he ever demand to see the diary after learning of its existence.

After the prosecution rested, Butler did not call a single defense witness, fact or character. He did not move for a motion in limine regarding supposed other allegations of sexual misconduct against Vasquez – vague, unsubstantiated and uninvestigated allegations that the prosecutor had relayed to him, Hr'g Tr. at 139:10-24, – and Vasquez did not testify. Having heard the prosecution's case

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refer to Sally McHugh throughout this Opinion, regardless of the specific point in time being discussed.

– the ten-year-old[13] victim, no physical evidence, a substantial delay in reporting the alleged incident, combined with the improbable circumstances of Vasquez assaulting Ashlee while other adults (including a Cleveland Police Department officer and Vasquez's wife) were upstairs in a tiny home and two other young children were in the same room – Butler renewed his Criminal Rule 29 motion, and then rested his defense at approximately 10:10 a.m. on Thursday, November 2, 2000. (Trial Tr. 293:7-14.)

Closing arguments and the Charge of the Court followed. (Trial Tr. at 2.) The jury was excused to deliberate around lunch time. (See *id.* at 370:12-17). By the start of the "Thursday Afternoon Session" on the same day, *id.* at 371:1, the jury returned a guilty verdict on both counts. (*Id.* at 371:21–373:15.) A sexual offender hearing and sentencing followed on December 18, 2000. (Trial Tr. at 389:6-8; ECF No. 31-4, Ex. 3, Judgment Entry.)

D. Post-Conviction Hearing

During the May 14-17, 2002 post-conviction hearing, Vasquez presented affidavits and corresponding testimony from several individuals. The critical testimony is as follows.

1. Don Butler's Post-Conviction Hearing Testimony

Butler testified and described his efforts representing Vasquez. Butler testified that he was assigned to the case on September 14, 2000. (Hr'g Tr. at 89:4-8.) Butler testified that he was "pretty sure" he talked with Vasquez in a holding cell following a pretrial on September 14, 2000. (Hr'g Tr.

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[13] Ashlee was nine years old at the time of the alleged incident, but ten years old at the time of trial.

90:22-23). He had no notes in his case file, however, to verify that he did, in fact, meet with Vasquez that day.[14] (Hr'g Tr. 93:21-25; 94:1-12.) He further testified that he met with Vasquez on at least three occasions. First, Butler testified that he met with Vasquez on October 12, 2000, in a holding cell after a pretrial conference, for between 12 and 25 minutes. (Hr'g Tr. 109:24-25–110:1-12; 349:7-14.). Second, Butler further testified that he met with his client on October 19, 2000, again in a holding cell after a pretrial conference, for about the same duration. (Hr'g Tr. 112:11-13; 350:18-24.) Third, Butler testified to meeting with Vasquez for another brief meeting on October 29, 2000, the night before trial, at Jail Number One. (Hr'g Tr. 121:23-25–122:1-10; 352:20-25–353:1-5.)

Butler also testified that he did some amount of pretrial preparation, such as legal research on child rape cases, Hr'g Tr. 103:4-15, filing standard discovery requests, Hr'g Tr. 100:6-16, and conferencing informally with the initial prosecutor,[15] Hr'g Tr. 92:13-19; 110:16–111:2. Butler further testified that he requested that Vasquez sign a speedy trial waiver on two occasions, the first during the October 19, 2000 conference, and again during the brief meeting on October 29, 2000.[16] *Id.* at 350:25–351:23. Notwithstanding Vasquez's refusal

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[14] Indeed, the state court docket reveals that Vasquez did not appear in court on September 14, 2000.

[15] Attorney Kestra Smith was the prosecutor during the pretrial investigation. The docket reflects that Attorney Lynn Travis prosecuted the case at trial. (ECF No. 31-5, Ex. 4, Notice of Appeal, docket.)

[16] Butler testified that he did not discuss speedy trial issues with Vasquez during the October 12, 2000 meeting. (Hr'g Tr. 112:14-17.)

to sign the speedy trial waiver, Butler testified that he was prepared to try the case when the October 30, 2000 trial commenced.[17] (Hr'g Tr. 125:9.) According to Butler's affidavit and supporting testimony, he made a professional judgment that there were no helpful witnesses for him to present at trial. (See Hr'g Tr. 125:9-15.)

Related to his investigation of the case, Butler testified that at some point Vasquez provided him with the name and phone number for Kitchen, Vasquez's mother-in-law.[18] According to Butler's testimony, Vasquez asked him to speak to Kitchen, as Kitchen would be able to provide Butler with the contact information for Karra Vasquez, from whom Butler could learn additional information about the case. (Hr'g Tr. 116:1-2, 13-16.) Butler testified that he subsequently telephoned Kitchen. (Hr'g Tr. at 116:19-20.) In Butler's version of the events as recounted at the hearing, Kitchen emphatically told him that no one from her family would help Butler with Vasquez's defense, and that the family would do everything they could to make sure Vasquez stayed

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[17] This testimony makes Vasquez's refusal to sign a speedy trial waiver irrelevant.

[18] The record is unclear exactly how and when Butler received Kitchen's name and phone number. Vasquez did not explicitly state in his post-conviction hearing testimony how or when he conveyed the information to Butler, although he testified that he gave Butler two ten-page handwritten letters containing information for Butler to investigate further. (Hr'g Tr. 349.) Butler similarly testified that Vasquez provided him with the information, but it is unclear whether the information was conveyed via the letters or orally. (See Hr'g Tr. 115-116.) To further complicate matters, Butler testified that he received the information "when I think I went up in the jail," Hr'g Tr. 116:13-16, but the uncontested facts are that Butler only visited Vasquez at "the jail" on the night before trial, October 29, 2000.

away from Karra. (Hr'g Tr. 116:19-24, 117:10-19.) Butler conceded, however, that he did not make any contemporaneous notes of the conversation. (Hr'g Tr. at 119:21–120:2.)

Butler also conceded in his testimony that he did not talk with Karra Vasquez, nor did he make any attempts to contact Karra beyond his singular telephone conversation with Kitchen. (Hr'g Tr. 118:8–119:2.) Butler denied that Karra Vasquez called him. (*Id.*)

Additionally, Butler testified that although he stated in his affidavit that it was his professional judgment that Becky Shaffer would not be a helpful witness, he did not actually talk with Becky, nor did he make any attempt to contact her. (Hr'g Tr. 121:2-4, 15-17.) Furthermore, he testified that he did not know about or speak with Tammy Salopek or her daughters, including Ashley Snyder. (*Id.* at 125:16–126:2.)

Finally, Butler testified that he did not have any documentary evidence to substantiate the vague allegations of other child abuse charges to which the prosecutor had referred in some meetings with Butler. (Hr'g Tr. at 139:10-24.) He also testified that he had no notes of any of his conversations with his client or with either of the prosecutors. (See, e.g., Hr'g Tr. at 93:21–94:12; 123:22–124:3; 124:15-20; 109:16-23; 112:2-6.)

Subsequent witness testimony explicitly and directly contradicted Butler's testimony on a number of critical points.

2. Karra Vasquez's Post-Conviction Hearing Testimony

a. Testimony about the investigation

Karra Vasquez gave specific testimony about numerous phone calls not only to Butler but to Attorney D'Angelo as well, calls that went unreturned. (Hr'g Tr. at 321:1-18.) Karra emphatically disputed Butler's testimony that she never contacted him, detailing her numerous attempts to talk with him about the case. (See generally, Hr'g Tr. at 321-322.) Karra testified that she made repeated phone calls to Butler's office to speak with him about Vasquez's case, but "he was never there." *Id.* at 321:15-18. She testified that she left her name, telephone number, and reason for calling with Butler's secretary, and was told that Butler would call her back. *Id.* Butler, according to Karra's testimony, never returned her calls. *Id.* at 322:16-17.

Karra Vasquez further testified that she attempted to help Vasquez initially, but that she did not attend the trial or sentencing because she felt threatened by social worker McHugh. (See Hr'g Tr. at 335:12-20; 329:8-15; 318:4–320:19.) According to Karra's testimony, McHugh threatened to remove Karra's children on grounds of child negligence if Karra persisted in believing that her husband was innocent and in helping his defense. (Hr'g Tr. at 318:4–320:19.)

b. Testimony about the underlying events

In addition to testifying about the investigation, Karra Vasquez also testified about personal observations from the nights of July 23, 2000 and August 4, 2000. Her testimony stands in contrast with that offered by witnesses at trial.

First and most critically, Karra specifically testified that she observed that Ashlee was wearing a bathing suit on the night of July 23, 2000:

> Question: As you reflect on what you observed that night, did you notice anything about, number one, her clothing?
>
> Answer: She was wearing a swim suit.
>
> Question: Did the swim suit or any other attire appear to be disheveled?
>
> Answer: No.

(Hr'g Tr. at 306:1-5.) Conversely, Ashlee testified at trial[19] – and told others who then recounted that same telling at trial – that Vasquez "pulled down my pants and underwear" before allegedly licking her vagina. (Trial Tr. at 41:5-7, 42:3-4.) Furthermore, Ashlee testified that when her father called from the top of the stairs to tell her it was time to leave, she "pulled my underwear and pants back up" and went back upstairs. (*Id.* at 48:3-4.) Steve Loomis testified at trial that Ashlee had told him that Vasquez "took her pants – her shorts and her panties off" and that when her father called from the top of the stairs, Ashlee "pulled her clothes on." (Trial Tr. at 170:8-9, 16-17.)

Second, and just as critically, Karra testified that Ashlee

> actually went down [to the basement] twice. She went down the first time for just a few minutes. Came back up. And then she went down the second time, and I could hear that they were changing Renee's diaper, getting the

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[19] Ashlee did not testify at the post-conviction hearing, nor did her father Steve Loomis.

> kids ready for bed. And then Steve said that it was time to go and he yelled down the steps and said Ashlee, it is time to go. She came running up the steps, because her dad called her, it was time to go, and they left.

(Hr'g Tr. 306:11-21.)

Karra Vasquez's testimony again explicitly contradicts Ashlee's account of the events that night; Ashlee testified at trial that she went down to the basement at Vasquez's invitation, she crawled up on the top bunk, he held her down and molested her, and only let her go when her father called her from the top of the stairs to say it was time to go. (See generally Trial Tr. 38-48.). Steve Loomis's testimony does nothing to bolster either side, as he testified that he did not actually observe Ashlee from the time he left her to eat her fast food in the living room until the time when he called to her from the top of the steps, because he had gone outside to talk with Karra Vasquez. (Trial Tr. 124:24–125:11.)

Third, Karra Vasquez testified that she, her husband, and their two daughters had just moved into Don Shaffer's basement on July 23, 2000, the night the alleged incident occurred. (Hr'g Tr. 306:24–307:10.)

Karra Vasquez's testimony conflicts with the version of events to which Ashlee previously testified. Ashlee testified that she met Vasquez for the first time at a family gathering at Kitchen's house. (Trial Tr. at 76:6-25.) Ashlee then testified that the second time she met Vasquez was at Don and Becky Shaffer's place, and that Vasquez, Karra Vasquez, and their two daughters had moved in to the Shaffer residence at the time. (Trial Tr. at 78:17–79:5.) According to Ashlee, nothing happened

with Vasquez on that second occasion (which, according to the otherwise-undisputed testimony, was the day Vasquez and his family moved in):

Question: Now, when you saw them the second time, which was at Don's and Becky's house, did anything happen on that occasion?

Answer: That occasion, no.

Question: Beg your pardon?

Answer: No.

Question: All right. And did Rob speak to you?

Answer: No.

Question: He didn't say hi?

Answer: He said hi.

Question: All right. Did you say hi?

Answer: Yes.

Question: All right. And did he ask you go anyplace with him on that occasion?

Answer: No.

(Trial Tr. at 79:7-24.) This testimony contradicts the testimony that the alleged attack happened on the day that Vasquez and his family moved into Don Shaffer's basement.

Fourth, Karra testified that Vasquez took their two young children down to the basement at around the same time Don Shaffer and Becky went upstairs to bed. (Hr'g Tr. 302:17-22.) Thus, Karra Vasquez testified, she was the only person upstairs (i.e. in the kitchen/living room area) when Ashlee and Steve Loomis arrived to eat. (See Trial Tr. 303:8-14.) She testified that Vasquez was already in the basement with their children when the Loomises

arrived. (*See id.*) According to Karra, Ashlee "was up with us [i.e Karra and Steve] and we were talking, and she said she wanted to see the kids, so she ran down to the basement. She was down there for maybe five minutes and came back up." (*Id.* at 305:22-25.)

Conversely, Ashlee alternately testified that "just Don [Shaffer]" was awake when she and her father arrived at the condo to eat, Trial Tr. 33:5-7; 90:6-8; that she saw Vasquez when she arrived at Don Shaffer's, Trial Tr. 33:9-11, 25; 34:1-2; and that when she arrived at the condo with her father, "Karra was on the couch watching T.V. with Rob[ert]," 92:18-25.[20] Ashlee also testified that Vasquez asked her to go down to the basement with him when Karra Vasquez and Steve Loomis began talking. (See Trial Tr. 36:12-15; 38:9-13.)

Karra Vasquez's testimony similarly conflicts with Steve Loomis's testimony about that night; he testified at trial that Vasquez was in the kitchen

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[20] The direct appeal court found that "Shaffer and Becky had retired for the night [by the time Ashlee and Steve Loomis arrived at Don Shaffer's condo]." (Direct Appeal Opinion, at 619.) Of the six persons who were able to testify about the night of July 23, 2000, adults Don Shaffer, Becky Shaffer, Karra Vasquez, Robert Vasquez, and Steve Loomis all confirmed whether in trial or post-conviction hearing testimony that Don Shaffer and Becky Shaffer had gone to bed by the time the Loomises arrived. Ashlee, on the other hand, gave internally and externally inconsistent testimony about who she observed upon arriving at Shaffer's condo

The direct appeal court also found that "the victim and her father proceeded to join [Vasquez, Karra, and their two small children] in eating the fast food." (*Id.*) There is nothing in any of the testimony, however, that supports the appeals court's finding that both families sat and ate together.

when Ashlee and Steve arrived, and that he "saw Rob go down into the basement." (Trial Tr. 124:1-2; 125:5.)

Fifth, Karra Vasquez testified that she heard conversation between Ashlee and Steve Loomis on the night Ashlee reported the alleged attack. Karra Vasquez testified that she was standing inside the screen door, while Ashlee and Steve were "standing right on the stoop" outside the door. (Hr'g Tr. 110:1-4.) According to Karra Vasquez, Steve Loomis asked Ashlee specific questions while she was recounting the alleged attack, such as when and how the incident happened, and how long did it take. (Hr'g Tr. 315:5-11.) Ashlee's initial response, Karra Vasquez testified, was that the incident took four episodes of Rugrats, which was two hours, to which Steve Loomis responded "that's too long. It couldn't have been two hours. You need to really think about this." (Hr'g Tr. 315:12-16.) Karra Vasquez further testified that Steve and his partner [Officer Zbikowski, who was not officially on duty at the time] were telling Ashlee that "you have to get this right. You have to make sure that you know exactly what you are going to say and repeat this to every person that asks you. You can't change your mind." (Hr'g Tr. 315:21–316:1.)

Sixth, Karra Vasquez testified that while she was at the front screen door listening to Ashlee talk with her father and Officer Zbikowski, Ashlee "kept responding as – well, does this mean I get to be on TV? If I tell them this do I get to be on TV. And she was laughing, giggling." (Hr'g Tr. 316:2-4.)

3. Becky Shaffer's Post-Conviction Hearing Testimony

Like Karra Vasquez, Becky Shaffer was present on the night of the alleged incident, although she was asleep at the time. She was also present for many of the events that occurred on the night of August 4, 2000. Yet Becky, like Karra Vasquez, was not called as a witness at the trial.[21] The critical portions of her testimony are as follows.

a. Testimony about the investigation

Becky Shaffer testified that Butler never talked with her to see what she might have to say. (Hr'g Tr. 262:21-22; 288:25–289:5.) She also testified that she received a subpoena from the prosecution to testify at trial, that she was in the courthouse all three days of the trial, and that she did not end up testifying at the trial.[22] (Hr'g Tr. at 262:23–265:7.)

b. Testimony about the underlying events

First, Becky Shaffer testified that she and her infant son Aaron rode with Ashlee and Steve Loomis in the ambulance on August 4, 2000. (Hr'g Tr. 253:14-25.) According to Becky's testimony, Ashlee appeared excited by the attention she was receiving during the ride to the hospital. (*Id.* at 255:8-12. Moreover, Becky specifically testified that "Ashlee asked if she was going to be on TV" while she was being attended in the back of the ambulance. (*Id.* at

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[21] Becky Shaffer was subpoenaed to testify as a prosecution witness, as her husband Don did.

[22] Becky Shaffer also testified that the prosecutor told her to leave the courthouse on the third day of trial, after learning that Becky might have potentially damaging information about Steve Loomis, because prosecutors "said they didn't want Don Butler to see me." (Hr'g Tr. at 264:17-21.) This testimony, if true, might well demonstrate suppression of a witness by the prosecution, which the Court finds unsettling to say the least.

255:22. See also, 256:7-8.) Becky testified that she found this statement "odd because Ashlee craved attention. And that is why - - and that's why some of this didn't sit well with some of the things that went on." (Hr'g Tr. at 266:3-11.) Becky was not questioned about the statement on cross-examination. This testimony echoes Karra Vasquez's testimony that Ashlee made the same statements about getting on TV while talking with her father and standing outside the door at the condo.

Second, Becky Shaffer testified that Vasquez, Karra Vasquez and their children had just moved into Don Shaffer's basement on July 23, 2000. (Hr'g Tr. 243:12-13.) This testimony reconfirms Karra Vasquez's testimony, and similarly conflicts with Ashlee's trial testimony that nothing happened on the day the Vasquez family moved into Don Shaffer's basement.

Third, Becky Shaffer testified that on the night of July 23, 2000 she and Don had gone upstairs to bed before Ashlee and Steve Loomis arrived at the condo. (Hr'g Tr. at 246:10-16.) She further testified that she was at work on the night of August 4, 2000 and came home in response to a phone call. (Hr'g Tr. at 249:1-20.)

This contradicts Ashlee's testimony that on the night of the alleged attack (July 23, 2000), Becky was at work and that Becky came home when Ashlee was in the ambulance. During direct examination about what happened on the night of July 23, 2000, Ashlee testified as follows:

Question: Where was Becky?

Answer: Becky was at work.

Question: She was at work?

Answer: Yeah.

Question: Okay. She wasn't in bed?

Answer. No.

* * *

Question: And you say Becky was at work?

Answer: Yes.

Question: How do you know Becky was at work?

Answer: Because when I was in the ambulance she came home, so that's how I know.

Question: She came home from work?

Answer: Yes.

Question: Well, wait a minute. I'm not talking about the time - - I'm not talking about when you told Uncle Don [Shaffer] what happened. I'm talking about when you went there and you had Burger Kings [sic].

Answer: I know.

Question: All right. I'm talking about when you say Rob touched your private part, where was Becky on that day?

Answer: At work.

Question: July 23rd?

Answer: At work.

(See Trial Tr. at 91:9–92:2.)

Fourth, Becky Shaffer testified that she took her son Aaron to the hospital on the night of August 4, 2000, because Steve Loomis and "the other police

officer" [Zbikowski] told her to do so, Hr'g Tr. 272:8-16, not because she suspected or was concerned that Vasquez had sexually abused Aaron. (See Hr'g Tr. 271:24–272:16; 273:1–274:15.)[23]

Fifth, Becky Shaffer testified that she had talked to the prosecutor about her concern regarding a conversation between Becky and Sally McHugh, during which conversation McHugh told Becky that she [McHugh] might be taking Karra Vasquez's children away. (Hr'g Tr. 293:8-11.)

4. Joanne Kitchen's Post-Conviction Hearing Testimony

Joanne Kitchen also testified at the post-conviction hearing. Although she was not present in the Shaffer home on either July 23, 2000 or August 4, 2000, she testified about her conversation with Don Butler. She was also present when social worker McHugh interviewed Karra Vasquez, and her testimony shed additional light on why Karra Vasquez did not play a more active role in Vasquez's defense. Additionally, Kitchen testified about her personal observations of Ashlee's desire for attention. Her critical testimony is as follows.

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[23] Curiously, the court at the post-conviction hearing found that Becky Shaffer "admitted that she reported to the hospital that she had come in with Ashlee Loomis, who reported that she was raped by Robert Vasquez, who lived in Shaffer's home and that she wanted to see if her son had also been abused." (Post–conviction Hearing Findings, at 16.) A closer analysis of Becky's testimony, however, makes this finding a significant stretch, if not an outright mischaracterization. This is especially so when considering the convoluted cross-examination questioning involving multi-part questions that elicited a "yes" and Becky's repeated testimony that she only took her son in the ambulance because Steve Loomis and another police officer directed her to do so.

a. Testimony about the investigation

First, Kitchen did not contest Butler's testimony that he telephoned Kitchen. (See Hr'g Tr. 116:19-20; 203:10-13.) Kitchen's testimony, however, hotly disputed the substance of that conversation as Butler recounted in his testimony. Kitchen testified that she only told Butler that she was not present on the night of the alleged attack and didn't know what went on that night. (Hr'g Tr. 204:19-23.)

Kitchen also testified to the following: (1) that she never told Butler that none of her family would help him defend Vasquez (Hr'g Tr. 204:24-25–205:1-10.); (2) that she never told Butler that she and her family would do everything they could to make sure Vasquez stayed in jail (Id. at 205:11-14.); and (3) that she never told Butler that she and her family would not cooperate in defending Vasquez (*Id.* at 205:15-18.). According to Kitchen, the telephone call lasted only two to three minutes. (*Id.* at 205:19-21.) Kitchen also testified that Butler never contacted her again. (*Id.* at 206:1-3.)

Second, Kitchen testified that McHugh indicated that the Department of Human Services would take action against Karra Vasquez regarding her children if Karra cooperated with Vasquez's defense. (Hr'g Tr. 202:2-6, 12-18.) According to Kitchen, McHugh stated that she would investigate if Karra Vasquez could keep the children, if Karra Vasquez was a fit mother, and that there was a possibility of putting Karra Vasquez's children in foster care. (*Id.* at 203:1-4.) While Kitchen declined on a few occasions to use the word "threatened" to describe McHugh's statements to Karra Vasquez about the children, the following exchange occurred during cross-examination:

Question: [Y]our testimony this morning was that you didn't think that the social worker threatened Karra, is that correct? Is that what you said this morning?

Answer: I said I didn't like the word threatened.

Question: So you didn't think that the social worker said anything that was threatening or that she made no threat?

Answer: Well, she did.

Question: Well, she did or she didn't?

Answer: She did. Well, not - -

Question: Is it a threat or wasn't it?

Answer: I don't like you using the term threatened. I mean, that's a strong word.

The Court: Let me ask a question: You were present during the conversation between Ms. [McHugh] and your daughter?

Answer: Yes.

The Court: Putting yourself in your daughter's [Karra's] shoes, would you have felt threatened by [McHugh's] statement?"

Answer: Yes.

The Court: Okay. Thank you.

(Hr'g Tr. 213:16–214:16).

b. Testimony about observations of Ashlee Loomis

Kitchen testified that Steve Loomis dated her daughter Christy for "a couple years." (Hr'g Tr. 208:4-6.) Accordingly, Kitchen testified, she

observed Ashlee on several occasions and interacted with the girl at various "family functions" to the point where Ashlee called Kitchen "Grandma." (Hr'g Tr. 193:11-23; 208:7-10.) Kitchen testified, based on her observations, that Ashlee was starved for attention without a mother in the home, and that "whatever was going on [Ashlee] had to . . . do one step better, or whatever the story was or whatever was going on, it had to be worse . . . that kind of thing." (*Id.* at 195:21-24.)

5. Tammy Salopek's Post-Conviction Hearing Testimony

Tammy Salopek testified on Vasquez's behalf. Importantly, Salopek provided compelling testimony about Ashlee's character for truthfulness. Her testimony also directly contradicted Steve Loomis's testimony in some critical aspects.

Salopek testified that she was good friends with Becky Shaffer, and that Salopek, Becky and Don Shaffer, and Steve Loomis were all part of a group that frequently socialized together. (Hr'g Tr. 143:18-25.) Salopek testified that she had a close relationship with Steve Loomis as a result of working with him for several years. (Hr'g Tr. at 143:9-22.) Salopek recounted that Steve Loomis's children – Ashlee and Kaylee – would play with her own children of approximately the same age, Hr'g Tr. at 145:6-8; that Ashlee and Kaylee would stay over, and sleep over, at her house "a lot," *id.* at 144:13–145:5; and that Ashlee was at Salopek's house "on average two, three times a week" during the summer of 2000, *id.* at 144:13-17. Conversely, she testified that she did not know Vasquez, that he was not a friend of hers, and that she had never seen him before. (Hr'g Tr. 155:17-23.)

Salopek also testified that her own children had been sexually molested by their step-grandfather, who was prosecuted but plea-bargained because Salopek did not want her children to testify. (Post-Conviction Hearing Findings, at 17 (citing Hr'g Tr. at 151).)

a. Testimony about Ashlee Loomis's character for truthfulness

Tammy Salopek testified to her observations of Ashlee Loomis's character for truthfulness based on her observations of the girl. Salopek testified that she had ample occasion in her role as a caretaker to observe Ashlee. (*Id.* at 145:13-15.) When asked on direct examination about her parental perspective of Ashlee, Salopek described Ashlee by testifying that "she seeks attention a lot. She is a little, kind of like a little drama queen." (*Id.* at 147:6-8.) Further testimony was as follows:

> Question: [A]s a result of your interaction with [Ashlee], do you have an opinion as to the character of this child for trustworthiness and honesty?
>
> Answer: Ashlee would – Ashlee would overexaggerate a lot of things. I caught Ashlee lying to me a few times, on a few occasions. I would say no.
>
> Question: What do you mean you would say no?
>
> Answer: I would say no, she is not extremely trustworthy. I wouldn't take anything that Ashlee would come and tell me on Ashlee's word.
>
> Question: Tell me why.

> Answer: I would have to go investigate it. Because generally that's not the way things happened and that's not what ended up happening.
>
> We had incidents. She had told me one time flat out. I think she hit Brandy, my daughter. And I mean, I saw her. I heard her. There was a mark on Brandy. And I flat out asked her why she did that, and she swore up and down she didn't do that. So stuff like that.
>
> Question: Is it more than just one occasion?
>
> Answer: Yeah. . . .

(*Id.* at (Hr'g Tr. 147:2–148:18.) Salopek further testified at length about how she did not trust Ashlee, that Ashlee "overexaggerates things," and that Ashlee was "never truthful." (See generally Hr'g Tr. 149-150:8.)

Moreover, Salopek testified that Ashlee craved attention, and that "[s]he is very, very melodramatic, very manipulative as far as her father is concerned. . . . she has got Steve right where she wants Steve." (*Id.* at 150:9-21.) The extent to which Ashlee craved attention, according to Salopek, was unique to Ashlee as compared to attention-seeking by other children. (*Id.* at 151:5-14.) Salopek additionally testified that she would not blame anybody for anything that Ashlee told her, because Ashlee "is just not believable all the time. She just wasn't." (*Id.* at 158:1-10.)

b. Testimony about Ashlee's demeanor following the reported allegations

Salopek testified about Ashlee's behavior in the days following August 4, 2000. According to Salopek, Steve Loomis called and told her about the

accusation lodged by Ashlee on Friday, August 4, 2000, and Ashlee stayed at Salopek's house the next three or four days. (Post-conviction Hearing Findings, at 17.) During that time, Salopek testified, Ashlee had no trouble sleeping or eating, she acted normally, had no emotional outbursts, and in general showed no behavior that was cause for concern. (Hr'g Tr. 155:2-16.)

Critically, Salopek's testimony about Ashlee's behavior following August 4, 2000 directly contradicts Steve Loomis's trial testimony as follows:

> Question: Now, following the disclosure to you of this incident, did Ashlee exhibit any unusual conduct? Let's start with the days immediately following.
>
> Answer: Um, yes, ma'am. She, um, she woke up several times throughout the course of the night, um, complaining of dreams, bad dreams. Um, she wanted to know if Rob was in jail. She was afraid that he was coming over. We had to, um - - subsequently, we had to walk around the house and make sure all the doors and windows were locked. We had to insure [sic] that Sammy, who's our black Lab. was in the house. She was terrified.
>
> Question: Now, in the days, let's say, in the immediate, you know, week following the disclosure to you, was she able to sleep by herself through the night - -
>
> Answer: Yes, ma'am.
>
> Question: - - in the days immediately following this?

Answer: No, not immediately following it, but it's gotten better since. Um, she's only waking up occasionally, now.

Question: Was she able to sleep by herself immediately following this disclosure?

Answer: No, ma'am.

(Trial Tr. at 141:22–142:19.)

6. Ashley Snyder's Post-Conviction Hearing Testimony

Ashley Snyder, who is Tammy Salopek's daughter, is about the same age as Kaylee Loomis (Ashlee's older sister). Snyder testified that she knows Ashlee Loomis well, though she is better friends with Kaylee because Snyder and Kaylee are closer in age. (Hr'g Tr. 167-168.) Snyder also testified that she had discussed with Kaylee the circumstances of Snyder's (and her sister's) sexual molestation at the hands of Snyder's step-grandfather. (*Id.* at 168:17–169:3.) Snyder testified that she believed (but was not sure) that Ashlee Loomis was present during the discussion about the sexual molestation. (*Id.* at 169:3-4.)

Moreover, Snyder testified that she believed, based on past experiences with Ashlee Loomis, that Ashlee told lots of stories, would "lie right to my face," and that "she did that very often." (*Id.* at 170:19–171:4.) Finally, Snyder, like her mother, testified that Ashlee Loomis had spent three to four nights sleeping over at Snyder's house in August of 2000, and that Ashlee did not exhibit any problems, unusual behavior, or crying while staying sleeping over. (Hr'g Tr. at 171:15–172:3.)

7. Vasquez's Post-Conviction Hearing Testimony

Vasquez testified on his own behalf at the post-conviction hearing, and his testimony contradicted Ashlee's and Steve Loomis's testimony – and supported Karra Vasquez's testimony – in some key places. Vasquez's testimony also disputed Butler's testimony in some respects.

a. Testimony about the investigation

Vasquez testified that he had no pretrial on September 14, 2000, and that he did not meet with Butler on that day, Hr'g Tr. 348:19-25, testimony that is verified by the trial court's docket entry for that day. According to Vasquez's testimony, the first time he met with Butler was on October 12, 2000, *id.* at 348:7-11, which contradicts Butler's testimony that Butler met with his client in a holding cell on September 14, 2000.

Vasquez also testified that Butler never discussed any other allegations of sexual misconduct against Vasquez. (Hr'g Tr. at 377-78.) On the other hand, Vasquez testified that Butler did discuss drug and trespassing charges from Nevada, and that it was Vasquez's understanding that Butler advised Vasquez not to testify at trial based on the two Nevada misdemeanors. (Hr'g Tr. at 376:7-10.)

b. Testimony about the underlying events

Vasquez testified that he did not see Steve Loomis on the night of July 23, 2000 and that he had no contact with Steve Loomis that night. (Hr'g Tr. 342:21-24; 343:17-19.) According to Vasquez's testimony, he was already in the basement taking care of his two daughters when the Loomises arrived

at Don Shaffer's condo. (*Id.* at 342:24–343:1.) Vasquez testified that he was downstairs "changing my daughters, and then Ashlee Loomis came downstairs for five minutes. She went upstairs, then she came back downstairs, and then they left." (*Id.* at 343:8-11.) He similarly testified that Ashlee and Steve Loomis arrived "between 10:30 and 11:00," and that they stayed for approximately 15-20 minutes. (*Id.* at 343:4-13.) Vasquez also denied that he licked Ashlee's vagina. (*Id.* at 343:23-25.)

Vasquez's post-conviction hearing testimony conflicts in several instances with the version of events from July 23, 2000 that Ashlee and Steve Loomis provided at trial. On the other hand, Vasquez's version of events is essentially the same version to which Karra Vasquez testified.

III. LAW AND ANALYSIS

A. AEDPA Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to Vasquez's habeas Petition because he filed his Petition after the April 24, 1996 effective date of the statute. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (relevant portions codified as amended at 28 U.S.C. § 2254[24] (2000)); *Williams v. Taylor*, 529 U.S. 362, 402 (2000); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998).

Federal courts examine a habeas petition filed by a prisoner in custody pursuant to a state court judgment as circumscribed by AEDPA, and

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[24] Unless otherwise noted, all references to sections of the United States Code are to Title 28.

specifically in this case under § 2254(d). Section 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

Under the "contrary to" clause of § 2254(d)(1), a federal habeas court may grant the writ only if the state court decision was based on a conclusion of law opposite to that reached in Supreme Court precedent. *Ramonez v. Berghuis*, 490 F.3d 482, 486 (6th Cir. 2007) (*citing Dando v. Yukins*, 461 F.3d 791, 796 (6th Cir. 2006)). *See also, Benge v. Johnson*, 474 F.3d 236, 241 (6th Cir. 2007) ("A state-court decision is considered 'contrary to . . . clearly established Federal law' if it is 'diametrically different, opposite in character or nature, or mutually opposed.'") (*quoting Williams v. Taylor*, 529 U.S. 362, 405 (2000) (quotation marks omitted)).

Under the "unreasonable application" clause, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Ramonez*, 490 F.3d at 486 (alterations included in original) (*citing Williams*, 529 U.S. at 413). To issue a writ on that ground,

"the federal court must find the state court's application of Supreme Court precedent 'objectively unreasonable,' not merely 'incorrect or erroneous.'" *Id.* (*citing Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003)). The federal habeas court must also presume that state court factual determinations are correct, unless the petitioner can demonstrate any state court error by clear and convincing evidence. *Id.*

The right to counsel guaranteed by the Sixth Amendment is the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). *Strickland v. Washington*, 466 U.S. 668 (1984) represents clearly established federal law as determined by the United States Supreme Court and applies to a habeas petitioner's claims of ineffective assistance of counsel. *See Williams*, 529 U.S. at 390. Vasquez seeks federal habeas relief from his state court conviction. Thus, in order for Vasquez to be entitled to habeas relief under AEDPA, he must show that the Ohio Court of Appeals reached a decision that was contrary to, or unreasonably applied, the *Strickland* standard as to trial counsel's performance and in determining whether there was any prejudice to Vasquez's defense. *See, e.g., Smith v. Lafler*, 175 Fed. App. 1, 4 (6th Cir. March 15, 2006).

Under *Strickland*, an ineffective assistance of counsel claim has two elements; to prevail, a petitioner must establish that both (1) the defense counsel's performance was constitutionally deficient, and (2) the deficient performance prejudiced the defense sufficiently to undermine the reliability of the trial. *Ramonez*, 490 F.3d at 486 (*citing Strickland*, 466 U.S. at 687).

The first *Strickland* element – the so-called "performance" element – requires Vasquez to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* (*citing Strickland*, 466 U.S. at 688). The Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, [a petitioner] must overcome the presumption that, under the circumstances, the challenged conduct might be considered sound strategy." *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005) (*quoting Strickland*, 466 U.S. at 689).

The second *Strickland* element – the so-called "prejudice" element – requires that a habeas petitioner demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Ramonez*, 490 F.3d at 487 (*quoting Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir. 2000)); *see also, Towns*, 395 F.3d at 258 (*citing Combs*, 205 F.3d at 278). Thus, these findings "are not findings of historical facts that are subject to the § 2254(e)(1) presumption of correctness for state court factual findings." *Ramonez*, 490 F.3d at 487 (*quoting McGhee v. Yukins*, 229 F.3d 506, 513 (6th Cir. 2000)).

B. Vasquez's Grounds For Relief

Vasquez presents four grounds for relief, all of which argue that Attorney Donald Butler rendered constitutionally ineffective counsel. (ECF No. 1.) As recounted above, the Court has already found ground (3) to be procedurally defaulted. Additionally, the

Court finds that ground (4) is also procedurally defaulted. The claim was raised on direct review and again on post-conviction relief, but was not initially brought before the highest court of the state on direct review. After Vasquez filed a motion for leave to file a delayed appeal in the Ohio Supreme Court, that court denied the motion. The Sixth Circuit has found that the denial of a motion for leave to file a delayed appeal by the Ohio Supreme Court constitutes a procedural ruling sufficient to bar review in this Court. *Bonilla v. Hurley*, 370 F.3d 494 (6th Cir. 2004); *Smith v. Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426, 431-32 (6th Cir. 2006). The Ohio Supreme Court denied Vasquez's motion for leave to file a delayed appeal on ground (4), and thus ground (4) is also procedurally defaulted.

Grounds (1) and (2), however, are exhausted, not procedurally defaulted, and are ripe for review by the Court.

1. The State Court's Conclusions Were An Unreasonable Application of Strickland

Vasquez alleges in his first and second grounds for relief that he received ineffective assistance of counsel when Butler failed to adequately meet and discuss the charges, only met with Vasquez three times in sessions of 15-20 minutes each, and failed to adequately investigate the case and interview potential witnesses. (ECF No. 1 at ¶¶ 12(A)-(B).) The state appeals court reviewed the testimony from the post-conviction hearing, and affirmed the trial court's denial of post-conviction relief. (ECF No. 31-53, Ex. 30. *See also State v. Vasquez*, 2004 Ohio 53, *P23 (Ohio Ct. App. Jan. 8, 2004).)

The Court finds that the state court application of *Strickland* in this case was objectively unreasonable. The state appeals court's findings – that Butler did prepare for trial, that he could not be expected to subpoena uncooperative family members, and that none of the witnesses who testified at the post-conviction hearing would have changed the outcome of the trial – are so contrary to the evidence adduced during the post-conviction hearing that they are an unreasonable application of *Strickland*. The Court is mindful that § 2254(e)(1) presumption of correctness applies to the findings of fact about Butler's credibility, especially because the findings were made following a three-day post-conviction hearing. Nevertheless, the Court finds that Vasquez has met his burden. Sadly, in this case his appointed counsel did almost nothing before or during trial, in a situation where the prosecution's case was weak and Vasquez faced life imprisonment.

a. The Performance Element: Counsel's Performance Was Deficient Because He Failed to Reasonably Investigate the Case

It is well-established that "'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Towns*, 395 F.3d at 258 (*citing Strickland*, 466 U.S. at 691). The duty to investigate derives from counsel's basic function, which is "to make the adversarial testing process work in the particular case." *Id.* (*quoting Kimelman v. Morrison*, 477 U.S. 365, 384 (1986) (*in turn quoting Strickland*, 466 U.S. at 690)). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690 (emphasis added). Strategic choices made after less

than complete investigation are reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* Failing to conduct pretrial discovery does not excuse this duty, even if counsel's performance at trial is "generally creditable." *Smith v. Lafler*, 175 Fed. Appx. at *4 (*quoting Kimmelman*, 477 U.S. at 386 (*in turn quoting Strickland*, 466 U.S. at 690)).

Furthermore, "in any effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). Critically, the Supreme Court's central teaching of *Strickland*, as reaffirmed by *Wiggins*, 539 U.S. at 522-23, is that "the investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the 'strategic' choice erected upon it rest on a rotten foundation." *Ramonez*, 490 F.3d at 488 (emphasis added). A "purportedly strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Id.* (*quoting Towns*, 395 F.3d at 258 (internal citations omitted)). Finally, the Sixth Circuit's *Towns* opinion "dispels any doubt that a lawyer's *Strickland* duty 'includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence.'"

Ramonez, 490 F.3d at 487 (*quoting Towns*, 395 F.3d at 258) (emphasis added).

Here, Butler's performance as a whole was deficient. Butler testified at the postconviction hearing that he did not present any witnesses at trial based on his professional judgments. But even crediting Butler's assertion that his reasoned professional judgment underlay his trial strategies, the fact still remains that his strategies rested upon a "rotten foundation." Butler simply failed in his duty to conduct an objectively reasonable investigation on which to base his conclusions about trial strategy, given the weakness of the state's case and the tremendously high stakes his client faced.

1. Witnesses Not Interviewed:

Butler contended that his incomplete investigation was due to non-cooperation from Vasquez's family members. Yet a single phone call to the mother-in-law of a defendant is hardly a solid foundation upon which to make the "strategic" choice to call nary a defense witness, as was the case here. As even Butler's testimony demonstrates, the single telephone call to Joanne Kitchen was the full extent of his investigation of any and all potential witnesses.

Butler never called Kitchen again, nor did he make any other efforts to track down and interview Karra Vasquez, though she was one of the few adults at the condo on the night of July 23, 2000. Although Don Shaffer and Becky Shaffer were known to Butler (indeed, Don Shaffer was a witness for the prosecution, while Becky had a subpoena to similarly testify), he failed to contact either person to learn what they might say, despite the fact that they, too, were adults physically present in the condo on the

night of July 23, 2000. Furthermore, Butler never made any effort to contact Salopek or her daughter Snyder; he did not even know of their existence because he failed to interview Becky Shaffer.

Even if Kitchen did say that she would not give Butler the telephone number for Karra Vasquez, as he testified, or tell Butler that no one in the family would cooperate with him – testimony that Kitchen herself flatly disputed under oath[25] – the fact remains that he neither tried to call Kitchen again or contact any of the other witnesses independently. This, despite the fact that Karra Vasquez testified that her mother did not speak for her, and that she called Butler's office several times and left messages asking to speak with him, but that Butler never returned her calls.

Respondent argues, and the state courts found, that the fact that Karra Vasquez did not attend trial or any of the hearings constitutes proof of her non-cooperation with Butler. The Court disagrees. Despite social worker McHugh's testimony at the post-conviction hearing that she never threatened Karra Vasquez with removal of her children if Karra insisted on helping Vasquez's defense, the critical point is that Karra Vasquez subjectively believed that McHugh had made such a

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[25] None of the reviewing courts – the state trial court conducting the post-conviction hearing, the state appeals court, and the federal magistrate judge – gave any reason for simply ignoring Kitchen's or Karra Vasquez's testimony that directly contradicted Butler's testimony, such as an explicit negative credibility finding. Importantly, there is no evidence other than Butler's self-serving testimony that the family would not speak with him about the case, and testimony from the various family members contradicts Butler's assertions of non-cooperation from the family.

threat. Kitchen's similar conclusion only bolsters Karra Vasquez's subjective understanding of McHugh's remarks, whatever McHugh may have literally said. Also, Becky Shaffer testified that Karra Vasquez conveyed her subjective concerns to Becky, further proof of the existence of Karra Vasquez's subjective fears. In Karra Vasquez's mind, she faced the untenable choice of continuing to support her husband by attending the trial and subsequent hearings, or risk having the state remove her children. Karra Vasquez even testified to this subjective understanding, saying "I tried to talk to Donald Butler, and it became a point that if I had to choose between my children and my husband, I chose my children." (Hr'g Tr. at 324:12-14.)

Moreover, the fact that Karra Vasquez did not attend trial or any of the hearings is irrelevant to the question of what she would have told Butler, or what she would have testified to at trial had Butler actually investigated her story. The fact still remains that Butler did not speak to Karra Vasquez before unreasonably abandoning his investigation. Had Butler actually returned Karra Vasquez's phone calls, he could have explained to her – as subsequent counsel apparently did, Hr'g Tr. at 332:4-6 – that she would not be at risk of losing her children just for helping her husband's defense. Instead, Butler abandoned his investigation at an objectively unreasonable juncture. *See, e.g., Ramonez*, 490 F.3d at 489 (finding that when a witness known to counsel could provide testimony beneficial to defendant, "it was objectively unreasonable for [counsel] not to interview [the witness] (or at least make reasonable efforts to interview [the witness]) before coming to his ultimate choice of trial conduct.").

As for Becky Shaffer, Butler testified that he determined that Becky would have been unhelpful as a witness for the defense because her husband, Don Shaffer, was listed as a prosecution witness and because she was one of Kitchen's daughters. Butler's decision was objectively unreasonable, however; he never actually spoke with – or even attempted to speak with – Becky to determine what she knew or would say if called to testify. Thus Butler's decision that Becky Shaffer would not be a helpful defense witness – whether based on her relationship to Don Shaffer or because of Kitchen's alleged statement that none of her family would help Vasquez's defense – was not based on an objectively reasonable investigation. The Sixth Circuit has instructed that "[c]onstitutionally effective counsel must develop trial strategy . . . based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation." *Ramonez*, 490 F.3d at 489 (emphasis added). Yet Butler's failure to fully investigate the information Becky Shaffer might provide was based on just that: a guess about what she might say.

Butler essentially (and unreasonably) ended any investigation of potential witnesses and the information they might provide based on a single three-minute telephone call. Butler thus abandoned his investigation at an unreasonable juncture, making impossible a fully informed decision on what witnesses to call at trial. *See Wiggins*, 539 U.S. at 527-28. Butler unquestionably had a duty under *Strickland* to investigate all witnesses who may have information concerning Vasquez's guilt or innocence, *see Ramonez*, 490 F.3d at 487, yet he utterly failed to do so by not speaking with Karra Vasquez, Becky Shaffer, Don Shaffer, or other potential witnesses

such as Kitchen, Salopek, or Snyder that he would have learned about in the course of a reasonable investigation.

2. Failing To Meet Sufficiently With Vasquez[26]

Likewise, Butler unreasonably investigated the case when he failed to fully and sufficiently discuss the case, and the prior convictions and allegations, with Vasquez. A purportedly strategic decision is not objectively reasonable when counsel has failed to investigate his options and make a reasonable choice between them. *Towns*, 395 F.3d at 258. Here, the evidence presented at the post-conviction hearing demonstrates that Butler's "strategic" decision was not objectively reasonable.

The evidence is undisputed that Butler met at most three times with his client, for 15-30 minutes each time. Butler had no notes of these meetings, and it appears that very little of substance was

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[26] The state court of appeals concluded that Robert's argument that Butler was ineffective because Butler advised Robert not to testify at trial was not part of the appeal because Robert did not make it part of any assigned error. (ECF No. 31-53, Post-Conviction Relief Appeal, at 787, n.4.) The state's Appellee's Brief in the instant case, however, argues that the claim was "properly dismissed as *res judicata* as it could have been raised on direct appeal. (ECF No. 31-48, Brief of Appellee, 20.)

The trial court, however, did not dismiss the claim as *res judicata*, despite the state's representation to the contrary. Instead, the trial court found that Butler was not directly questioned about his decision not to have Robert testify. (Post-Conviction Hearing Findings, at 23:¶36.) The court then found that nothing Robert testified to at the post-conviction hearing "could have had a bearing on the outcome," and in "light of this, Butler advice that defendant should not testify, if he gave it, was professional responsible and wise." (*Id.* at 26:¶4.)

discussed. Most significantly, Butler did not discuss with Vasquez the vague allegations that his client had molested other individuals, which Butler alluded to as a basis for his trial strategy. (See Hr'g Tr. at 139:10-17.) Butler's testimony establishes that in advance of trial the prosecutor informed Butler of two other supposed accusations of sexual misconduct that had been leveled at Vasquez. Butler did not, however, conduct any further investigation to determine if there was any truth to the prosecutor's information, and apparently did not even discuss the supposed allegations with Vasquez. Vasquez testified that he was not aware of one of the supposed allegations until his sentencing, and that he only learned of the other supposed allegation from testimony at the post-conviction hearing.

Butler had a professional duty to learn as much as he could from the prosecutor, Vasquez, and other witnesses about these supposed additional allegations, especially if he based his trial strategy on them. Yet counsel did no investigation into these allegations, and thus his trial strategy was not supported by reasoned deliberation as required.

The Court does not mean to suggest that under no circumstances could counsel's failure to put Vasquez on the stand be deemed an objectively reasonable decision. Indeed, defense counsel frequently decide that the best trial strategy does not include putting the defendant on the stand. In this case, the decision not to have Vasquez testify would have been a difficult one to make; the charges involved an adult who was alone with a minor at the time of the alleged attack, and the child had testified. The critical point, however, is that it was objectively unreasonable for Butler to make that decision without first fully investigating the

allegations. *See Towns*, 395 F.3d at 260 (citations omitted).

Based on the foregoing, the Court finds that counsel's performance was so objectively unreasonable that it fell far below the representation required for constitutionally effective assistance of counsel.[27] Accordingly, the state appeals court's conclusion to the contrary was objectively unreasonable.

b. The Prejudice Element: Counsel's Ineffective Assistance Prejudiced Vasquez

As explained, counsel's performance was well below that required for constitutionally effective representation. Vasquez, however, must still meet *Strickland*'s prejudice prong, i.e. he must show a reasonable probability that but for that deficiency the outcome would have been different. At the conclusion of the post-conviction hearing, the state trial court concluded that "not one of the witnesses who testified – neither the defendant, his family or others – offered any testimony that could have changed the outcome of the defendant's trial." (Post-conviction Hearing Findings, at 25.) The state appeals court agreed with the trial court's statement. (Post-conviction Appeal Opinion, at 788-89, *Vasquez*, 2004 Ohio 53, *P21.) The Court, however, finds that Butler's deficient performance prejudiced the defense sufficiently to undermine the reliability of the trial, and thus the state appeals court's findings to the

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[27] The instant Opinion should not be taken as a blanket condemnation of Attorney Butler's competence or professionalism. The Court has known Attorney Butler professionally for many years, and has seen him perform exceptional work in the courtroom in very difficult criminal cases.

contrary were an objectively unreasonable application of *Strickland*'s prejudice element.

The Supreme Court has explained that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support." *Strickland*, 466 U.S. at 696. *See also, Towns*, 395 F.3d at 260 (*citing Strickland*, 466 U.S. at 696; *Clinkscale v. Carter*, 375 F. 3d 430, 445 (6th Cir. 2004)). Just as important for purposes of habeas review, a state court's blanket assessment of the credibility of a potential witness – at least when made in the context of evaluating whether there is a reasonable probability that the witness's testimony, if heard by the jury, would have changed the outcome of the trial – is not a fact determination within the bounds of § 2254(e)(1). *Ramonez*, 490 F.3d at 490. Instead, what the state court has <u>really</u> done in that situation "is to state its <u>view</u> that there is not a reasonable probability that the jury would believe the testimony and change its verdict." *Id.* (emphasis added). The Sixth Circuit has made it clear – especially in the context of a Strickland evidentiary hearing – that the "Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence." *Id.* (*citing Barker v. Yukins*, 199 F.3d 867, 874 (6th Cir. 1999)).

In *Barker*, in the context of deciding whether a defective self-defense jury instruction was harmless error, the Sixth Circuit held that the state court crossed the line between findings appropriate for the judge – and therefore accorded § 2254(e)(1) deference – and findings left to a jury, when it found the defective instruction had no consequence because the jury would not have believed the self-defense testimony of the defendant anyway. *Id.* (*citing*

Barker, 199 F.3d at 874). Whether to believe the defendant's testimony on that score, the court reasoned, was an issue for the jury and not the judge. *See id.* Similarly, in *Ramonez*, the state appeals court found that the would-be witnesses would not have provided testimony that would have changed the trial's outcome. *Id.* at 489. The government argued that § 2254(e)(1) demanded that the Sixth Circuit defer to the state court's assessment of lack of credibility and helpfulness of the would-be witnesses, which, the government argued, in turn undercut any reasonable probability that the jury would have altered the verdict based on their testimony. *Id.* at 489-490.

The Sixth Circuit disagreed, explaining that "Section 2254(e)(1) does not support that proposition." *Id.* at 490. The Sixth Circuit has further explained the difference between credibility determinations that are for the jury and those made by the state judges that are entitled to the § 2254(e)(1) presumption. Specifically in the context of a case such as the instant one, "it is for the judge to evaluate the credibility of the criminal defendant and the former defense counsel in deciding what advice counsel had in fact given to the defendant during his trial, and such findings are entitled to the Section 2254(e)(1) presumption." *Ramonez*, 490 F.3d at 490 (*citing Sophanthavong v. Palmateer*, 378 F.3d 859, 867 (9th Cir. 2004)). The court continued, explaining that such credibility determinations are within a judge's province, but are different in kind from a finding that a jury would not believe a witness's testimony. *Id.* (emphasis added). Weighing the prosecution's case against the proposed witness testimony is at the heart of the ultimate question of the *Strickland* prejudice prong, and thus

it is a mixed question of law and fact not within the § 2254(e)(1) presumption. *Id.* at 491.

The state court's finding in the instant case is essentially a finding that the jury would not have believed any of the testimony from Karra Vasquez, Becky Shaffer, Joanne Kitchen, Tammy Salopek, Ashley Snyder, or Robert Vasquez, and thus there was no prejudice to Butler's ineffective assistance. The critical point, however, is not whether the Court believes or disbelieves the testimony that the post-conviction hearing witnesses provided; it is simply a question of what testimony those witnesses would have provided at trial had Butler's performance been effective, and whether their testimony, had the jury heard it, might reasonably have changed the outcome of the trial.

Significantly, the state's case against Vasquez rested entirely on the testimony of Ashlee Loomis, the victim, who was 9 years old at the time of the alleged sexual assault and 10 years old at trial. As the prosecutor said in closing argument: "This case comes down to whether or not you believe Ashlee Loomis and her testimony." (Trial Tr. at 296.) There was no DNA or other physical evidence presented, and no one besides the victim who witnessed the assault. The victim did not report the incident for at least 10 days. The only corroboration was the testimony of several adults (a family friend of the victim's father, the victim's father, a police officer, and a social worker[28]) to all of whom petitioner had subsequently given a consistent version of the assault.

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[28] Detective Chappelle also testified at trial, but he did not interview the victim.

Accordingly, counsel needed to develop a strategy of casting doubt on the validity of the victim's testimony. There were three ways to do this: (1) identifying inconsistencies in her version of the facts, based upon the testimony of other witnesses who were present in the house the night of the alleged incident; (2) locating witnesses who would testify to the victim's reputation for untruthfulness; and/or (3) putting petitioner on the stand to refute the victim's testimony. Trial counsel did none of these things. Had he done even one of them, there is at least a reasonable probability that the outcome of the trial may have been different. Since counsel did none of them, petitioner faced an almost certain conviction and a life sentence.

Most significantly, Karra Vasquez's testimony would have dramatically undermined the victim's version of events on the night of the alleged incident. She testified at the post-trial hearing (and presumably would have done so at trial) that Ashlee was wearing a bathing suit that night. Yet Ashlee testified at trial (and in all her prior statements to others) that Vasquez pulled down her pants and underpants while holding his other hand over her mouth so she could not yell out. Karra Vasquez's testimony about Ashlee's clothing alone would have called into question Ashlee's version of the events. None of the other testimony from persons at the condo on July 23, 2000 went directly to personal observations of what Ashlee was wearing that night. Testimony that did discuss the girl's clothing was only in the context of recounting what Ashlee had told the witness about the alleged attack.

Karra Vasquez's testimony about various other critical observations from the night of July 23, 2000 is also at odds with, and would have cast at

least some measure of doubt on, the testimony Ashlee and Steve Loomis provided. For instance, Karra Vasquez would have testified that Vasquez had previously descended into the basement with their two young girls before Ashlee and Steve Loomis arrived at the condo. Conversely, Steve Loomis testified that he saw Vasquez in the kitchen when he arrived. Ashlee, for her part, provided at least two different recollections, first testifying that Don Shaffer was the only adult awake when she and her father arrived, and then testifying that Vasquez and Karra Vasquez were in the living room on the couch watching television when Ashlee and Steve Loomis got to the condo. Also, Karra Vasquez's testimony would have placed Vasquez already in the basement at the time when Ashlee alleged that he invited her to go down to the basement to watch cartoons. In yet another instance of conflicting testimony, Karra Vasquez would have testified that Ashlee went down the stairs and back up twice, and that Ashlee was in the basement for no more than five minutes the entire time during which Karra could hear Vasquez changing his daughter's diaper and getting the girls ready for bed. This directly contradicts Ashlee's testimony that she went downstairs, got on the bunk bed, and only left when her father called to her from the top of the stairs.

Further, Karra Vasquez would have testified at trial that Ashlee's father, Steve, a police officer, was coaching her daughter the night she reported the alleged assault. Specifically, she would have testified that she heard Ashlee Loomis initially tell her father that the incident had lasted for "four episodes of RugRats" to which Steve Loomis replied that was impossible. She also would have testified that she heard Steve Loomis and his partner tell Ashlee that she "ha[d] to get this right. You have to

make sure that you know exactly what you are going to say and repeat this to every person that asks you. You can't change your mind." This testimony, if true, would dramatically undercut the rationale given by the appeals court for concluding that any ineffectiveness by Butler was not prejudicial. The fact that a nine-year-old girl recounted the same story to multiple people takes on entirely different significance if her father – whom Ashlee testified that she feared and who, she testified, "whups" her when she lies, see Trial Tr. at 59:25–60:18; 101:13-14, – instructed her that she had to tell the same story every time.

Karra Vasquez's testimony about the events on the night of the alleged incident was absolutely essential for defending the case, as she was one of only five adults in the Shaffer condo that night, and one of only three adults awake after the Loomises arrived. Karra Vasquez also provided a comprehensive account of events on the evening of July 23, 2000 that differed dramatically in critical places from the accounts given by Ashlee and Steve Loomis. This testimony would have been extremely damaging for the prosecution's case, yet the jury never heard from Karra Vasquez because Butler never interviewed her.

Moreover, had counsel done any investigating, he would have spoken to Don Shaffer's wife, Becky, who was present that night. Becky Shaffer, like Karra Vasquez, would have testified that she too heard Ashlee asking if she was going to be on TV in the aftermath of the allegations. Significantly, each woman testified to hearing Ashlee make the comments in independent situations: Becky's testimony about Ashlee's comment in the ambulance would have been especially important for the jury to

hear in conjunction with Karra Vasquez's testimony about Ashlee making a similar comment while outside the condo door. Such testimony might reasonably have caused at least one juror to have at least reasonable doubt about the impetus for Ashlee's allegations.

Becky Shaffer also would have testified that the Vasquez family had just moved into Don Shaffer's basement on July 23, 2000. This fact directly contradicts Ashlee's testimony that nothing happened on the day that the Vasquez family moved in with the Shaffers and that the alleged attack happened later. Becky Shaffer also would have testified that she was upstairs asleep on the night of the alleged incident, and at work on the night Ashlee reported it, which, again, contradicts Ashlee's testimony.

Furthermore, had Butler interviewed Becky Shaffer, she would have put him in touch with Tammy Salopek and her daughter Ashley Snyder. Salopek was a close friend of Ashlee's father Steve Loomis, while Snyder was good friends with Ashlee Loomis. Ashlee spent many nights at the Salopek residence. Both Salopek and her daughter would have testified that Ashlee had a distinct reputation for untruthfulness, and a propensity to tell outrageous lies. (Joanne Kitchen's testimony about Ashlee's character and need for attention might reasonably have further reinforced the picture that Salopek and Snyder painted of the accuser.)

Salopek, who first "met" Vasquez at the post-conviction hearing, also would have testified that Ashlee stayed with her for several nights, starting 3 or 4 days after the alleged assault, and that Ashlee was acting normally and had no difficulty sleeping. Snyder would have testified similarly.

Salopek's and Snyder's testimony would have impeached the trial testimony of both Ashlee Loomis and her father Steve Loomis, who testified to Ashlee's strange and frightened behavior immediately following the reporting of the incident. Indeed, the court of appeals even acknowledged as much: finding that Snyder's testimony did not demonstrate sufficient evidence that Ashlee Loomis had made a false rape accusation against her uncle in New York, the court explained that "Ashley Snyder's testimony casts doubt generally on the victim's veracity only in this case." (Post-conviction Appeal Opinion, at 792 (emphasis added).)

The testimony that Salopek and Snyder – as well as Kitchen – provided would have directly impeached Ashlee's credibility and character for truthfulness, a critical task in defending Vasquez when the case rested almost solely on Ashlee's testimony. Salopek's and Snyder's testimony would have similarly impeached Steve Loomis's testimony. Butler did not reasonably investigate potential witnesses, however, and thus he never learned of Salopek and her daughter. Consequently, the jury never heard or considered their potentially devastating testimony.

Additionally, Butler was never questioned why he did not put Vasquez on the stand, but Vasquez testified that Butler had indicated that he feared Vasquez would be subject to cross examination on prior convictions. Butler said nothing about basing his trial strategy (at least as it relates to putting Vasquez on the stand) on the vague allegations of additional sexual misconduct. He could not have reasonably done so, because he did not investigate the charges further. Consequently, Butler was not in a position to make a fully informed decision on how

to defend the case and what witnesses to call, and his advice to Vasquez not to testify took away one significant avenue of countering Ashlee's testimony.

Moreover, since there were no formal charges, let alone convictions, Butler would have been in position to file a motion in limine with the trial judge seeking a ruling that the prosecutor could not use these allegations to impeach Vasquez. Without doing any investigation, counsel was not in a position to file this motion. Butler's decision made the case a "she said" case rather than at least a "he said-she-said" situation, with the jury hearing (unrebutted) testimony from one of the two people who truly knew what happened that night.

While it is certainly true that a jury hearing testimony from Karra Vasquez, Becky Shaffer, Joanne Kitchen, Tammy Salopek, Ashley Snyder, or Robert Vasquez could have discredited their testimony that either attacked Ashlee's character for truthfulness, or her account of the night in question, there certainly remained a reasonable probability that the jury would not have.[29] All it would have taken is for one juror to disbelieve Ashlee's version of the events.

The sad reality is that Butler went into trial with absolutely nothing, with the predictable result

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[29] While it is not within this Court's province to pass on Karra Vasquez's credibility, the Court notes that she was in the process of divorcing her husband at the time of the post-conviction hearing, and thus had little or no incentive to fabricate a story on behalf of Vasquez. Similarly, Tammy Salopek was not only an entirely disinterested witness in that she had no connection to Vasquez whatsoever, but she also testified that she was close friends with the victim and her father.

that Vasquez was convicted after a very short jury deliberation. Butler could only cross-examine Ashlee with general questions, and made virtually no attempt to impeach her credibility, though evidence existed had he done a reasonable investigation. The ineffectiveness of his preparation, cross-examination, and overall strategy, was highlighted when he asked Ashlee if she had written about the alleged assault in her diary; she replied that she had done so, and that she still had her diary. Counsel should have never asked this question unless he knew the answer was "no." But having blundered, he had a professional obligation to demand to see the diary to see whether Ashlee had written anything, and if so, how it compared to her testimony. Counsel apparently did – and could do – nothing, because he did not investigate the case sufficiently. Consequently, the jury was left with the devastating impression that Ashlee had written a contemporaneous account of the assault which was consistent with how she described it numerous times later.

Had Vasquez or the other post-conviction hearing witnesses testified at trial, there is at least a reasonable probability that reasonable doubt could have been created in the minds of the jury. To find otherwise, as the state courts did, is an objectively unreasonable application of *Strickland*.[30] Even

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[30] The Court also notes, after comparing the trial and post-conviction hearing transcripts with the state court's Post-conviction Hearing Findings, that the trial court's opinion misconstrued or mischaracterized witness testimony in some places.

Consider the following examples:

1) the court found that Joanne Kitchen, Becky Shaffer, and Karra Vasquez "themselves corroborated" that they refused

applying a heavy measure of deference to counsel's decisions, the testimony brought forth at the post-conviction hearing demonstrates that counsel's decisions in advance of and during trial were not reasonable, or supported by reasoned consideration; that ineffectiveness was most certainly prejudicial. Therefore the state appeals court's decision affirming the trial court's ruling was an unreasonable application of *Strickland*.

2. The State Court's Conclusions Were Contrary to Strickland

The Court further finds that the state appeals court's post-conviction opinion holding is contrary to *Strickland*. Importantly, the appeals court applied the wrong standard to the prejudice element. The appeals court affirmed the trial court's holding,

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to help in Vasquez's defense, ECF No. 31-38, 24:¶2, when in fact the testimony is directly contrary to such a finding;

2) the court found that Becky Shaffer "suspected Robert Vasquez had [caused her son's rectal bleeding]", when Becky actually testified that authorities on the scene had told her that she needed to take her son to the hospital in the same ambulance with Ashlee Loomis, *id.* at 19:¶28;

3) the court found that "JoAnn [sic] Kitchen also denied that Sally Weindorf threatened her daughter Mrs. Vasquez with removal of her children if Mrs. Vasquez assisted in her husband's defense." *Id.* at 15. While Kitchen declined to explicitly use the word "threaten" to describe the situation, her overall testimony clearly demonstrated that Kitchen believed McHugh had conveyed the idea that Karra Vasquez would lose her children if she helped in her husband's defense;

4) the court found that Tammy Salopek "described Ashlee [Loomis's] character for trustworthiness and honesty by stating that she caught Ashlee lying to her on a few occasions and that she is not extremely trustworthy," *id.* at 17. In fact, Salopek's testimony entailed substantially more critical assessment of Ashlee's character for truthfulness.

reasoning that Vasquez could not show that "the outcome of his trial would have been different" had Butler called at trial the witnesses who only testified at the post-conviction hearing. (Post-conviction Appeal Opinion, at 788, *State v. Vasquez*, 2004 Ohio 53 at *P20 (emphasis added).) The trial court, for its part, recited an incorrect standard at least twice in the Post-conviction Hearing Findings, declaring that *Strickland*'s second prong requires a petitioner to show that "the result of petitioner's trial or legal proceeding would have been different had defense counsel provided proper representation." (Post-conviction Hearing Findings, at 4:¶10; 5:¶11 (emphasis added).)

The Supreme Court, however, specifically rejected an outcome-determinative test in *Strickland*, 466 U.S. at 693-94. *Smith v. Lafler*, 175 Fed. Appx. at *6 n.1. Thus, Vasquez's burden under Strickland is not to show that the outcome of his trial would have been different. *See id.* (stating that to require a habeas petitioner "to show that the outcome of the proceedings would have been different" is "contrary to Supreme Court precedent."). Instead, Vasquez is only required to show a "reasonable probability" that the outcome would have been different but for Butler's errors. Simply stated, the appeals court applied a higher (and potentially impossible) burden than the already substantial burden required under *Strickland*.[31]

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[31] While the appeals court subsequently stated that "[w]e agree with the trial court's conclusion that 'not one of the witnesses who testified [at the post-conviction hearing] offered any testimony that could have changed the outcome of defendant's trial,'" Post-conviction Appeal Opinion at 788-89, *State v. Vasquez*, 2004 Ohio 53 at *P21, the court then repeated its erroneous application of a higher burden to a second portion of

Such application was, therefore, contrary to *Strickland*. This error, in and of itself, would not necessarily be enough to grant the writ, if there was no basis to cast doubt on the outcome. That is not the case here, however. The Court finds that the error was prejudicial, not harmless, because there was at least a reasonable probability that but for counsel's ineffectiveness the outcome of the trial would have been different.

C. The Writ Must Be Granted

The Sixth Amendment right to counsel guarantees a defendant minimally competent representation. The case law clearly instructs that what is reasonable to expect counsel to do is measured by the facts and circumstances of each case. The prejudice prong of *Strickland* requires an examination of the strength of the prosecution's case, what counsel did to counter it, and whether there were things a minimally competent counsel should have done which may have made a difference. After carefully reviewing the entire record in this case, including all trial and post-conviction hearing testimony, the Court is left with the inescapable conviction that petitioner was denied his Sixth

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Vasquez's ineffective counsel claim: "We have already determined that none of defendant's evidence dehors the record, namely, the witnesses who testified at the post-conviction hearing, would have changed the outcome of his trial." (Post-conviction Appeal Opinion at 789, *State v. Vasquez*, 2004 Ohio 53 at *P22 (emphasis added).)

Additionally, this statement seems to indicate that the court evaluated the witnesses in isolation, as if Vasquez must prove that a single witness's testimony would cast doubt on the outcome. The proper focus must be on the cumulative effect of the witnesses' testimony. *Towns*, 395 F.3d at 257 (*quoting Wiggins*, 539 U.S. at 536).

Amendment right to effective assistance of counsel. Because Vasquez has established that his trial counsel was constitutionally deficient and that he was prejudiced by this deficient performance, he is entitled to the issuance of a writ of habeas corpus.

IV. CONCLUSION

For the reasons stated above, the writ of habeas corpus is **CONDITIONALLY GRANTED**. Unless the State of Ohio elects to retry Robert Vasquez and does so within 120 days of issuance of this Court's final judgment entry, Vasquez must be unconditionally released.

IT IS SO ORDERED.

/s/Dan Aaron Polster October 3, 2007
Dan Aaron Polster
United States District Judge

APPENDIX D

No. 82156

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,

Petitioner-appellee,

v.

ROBERT S. VASQUEZ,

Defendant-appellant,

Filed: January 20, 2004

JOURNAL ENTRY
AND OPINION

Date of Announcement of Decision: January 8, 2004

Character of Proceeding: Criminal appeal from Common Pleas Court, Case No. CR-394976

Judgment: Affirmed

Date of Journalization: January 20, 2004

Appearances:

For plaintiff-appellee: William D. Mason, Esq., Cuyahoga County Prosecutor, Lisa Reitz Williamson, Esq., Assistant County Prosecutor, The Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113

For defendant-appellant: Karl R. Rissland, Esq., 9442 State route 43, Streetsboro, Ohio 44241

KARPINSKI, J.:

Defendant-appellant appeals the trial court denying his petition for post-conviction relief and motion for leave to file "Motion for New Trial Instanter." For the reasons that follow, we affirm the judgment of the trial court.

In November 2000, defendant was convicted by a jury of one count of rape of a child under the age of thirteen (R.C. 2907.02) and one count of kidnaping (R.C. 2905.01) with a sexual motivation specification. The facts leading to defendant's convictions are fully set forth in this court's decision in his direct appeal: *State v. Vasquez*, (November 2, 2001), Cuyahoga App. No. 79319. For purposes of the appeal at bar, the pertinent facts are as follows.

On July 23, 2000, the nine-year-old victim in this case, and her father, a Cleveland police officer, were at Don Shaffer's house. Shaffer and the victim's father were best friends. Also at the house that day were Becky Egbertson, Shaffer's fiancee, her sister, Karra Vasquez, and her husband, the defendant in this case, and their two children.

At some point on the 23rd, the victim and defendant were alone when the following events transpired:

> Vasquez invited the victim to go downstairs into the basement to watch television and to help him with his two small children. In the basement was a bunk bed. The victim testified that she climbed onto the top bunk and that Vasquez also climbed onto the top bunk after removing the bunk ladder. According to the victim, he then pushed her down with his arm and, while holding his hand over her mouth, he pulled down her

> pants and underwear and began licking her private spot. As he was doing this, his two infant children were crawling around on the bottom bunk. He continued the assault until the victim's father called to her from the top of the stairs. The victim then put her clothes back on and went home.

Vasquez, 2001 Ohio App. Lexis 4910, at *3.

After several days, the victim told her father that defendant had sexually assaulted her. "The father called his partner at the police department to request that he come over to the house. He and his partner then talked with his daughter to explain the serious nature of the charges and to assure she was telling the truth. He then called 911." *Vasquez*, supra.

In the direct appeal to this court, defendant assigned various errors including that he had been denied effective assistance of trial counsel because his attorney failed to locate potential defense witnesses, failed to prepare a defense because he was overworked, failed to object to hearsay testimony, and elicited prejudicial testimony from one of the state's witnesses on cross-examination. On November 29, 2001, this court overruled all the assigned errors and affirmed defendant's convictions. Before the direct appeal was decided, however, defendant filed in the trial court a "Motion for Leave to File Motion for New Trial Instanter"[1] and a petition for post-conviction relief[2].

While the direct appeal of Vasquez was pending, the trial court conducted a three-day

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[1] Filed on July 23, 2001.

[2] Filed on October 9, 2001.

hearing on defendant's petition for post-conviction relief and denied the petition on November 14, 2002. Thereafter, the court issued findings of fact and conclusions of law on December 6, 2002 and also denied defendant's "Motion for Leave to File Motion for New Trial Instanter." It is from these two orders defendant now appeals. Because the first two assignments of error are related, we address them together.

> FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN THE COURT DENIED APPELLANT'S PETITION TO VACATE AND SET ASIDE CONVICTION WHEN THE PETITION ASSERTED THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE U.S. AND OHIO CONSTITUTIONS WHEN APPELLANT CLEARLY DEMONSTRATED AT AN EVIDENTIARY HEARING THAT APPELLANT'S TRIAL COUNSEL FAILED TO INVESTIGATE THE ALLEGATIONS, FAILED TO LOCATE AND INTERVIEW WITNESSES, FAILED TO ADEQUATELY PREPARE FOR TRIAL, FAILED TO PRESENT A DEFENSE IN THE CASE AND APPELLANT WAS PREJUDICED BY THAT FAILURE.
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> SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN THE COURT APPOINTED AN ATTORNEY WHOSE EXTENSIVE CASELOAD PROHIBITED THE ATTORNEY FROM

ADEQUATELY INVESTIGATING APPELLANT'S CASE AND PREPARING THE CASE FOR TRIAL, THEREBY DENYING APPELLANT COMPETENT, EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF APPELLANT'S U.S. AND OHIO CONSTITUTIONAL RIGHTS.

Defendant claims the trial court erred in denying his petition for post conviction relief because he received ineffective assistance of counsel both before and during his trial. Defendant argues that the evidence he presented dehors the trial record during the hearing on his petition for post conviction relief entitles him to a new trial.

R.C. 2953.21 provides the following procedure for post-conviction petitions:

> (A) (1) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

A reviewing court will not overrule a trial court's finding on a petition for post conviction relief absent a showing of an abuse of discretion. *State v. Davis* (1999), 133 Ohio App.3d 511, 515, 728 N.E.2d 1111." An abuse of discretion connotes more than an error

of law or judgment; it implies conduct that is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St. 2d 151, 157, 404 N.E.2d 144.

To determine whether a defendant has been denied his Sixth Amendment right to effective assistance of counsel, a court must decide "whether the accused, under all the circumstances, *** had a fair trial and substantial justice was done." *State v. Grahek*, Cuyahoga App. No 81443, 2003-Ohio-2650 at ¶¶65-66 quoting *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of syllabus.

A defendant must demonstrate that trial counsel's performance fell below the objective standard of reasonable competence under the circumstances and that there exists a reasonable probability that, but for such deficiency, the outcome of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. A defendant bears the burden of proof on this issue because in Ohio a properly licensed attorney is presumed competent. Furthermore, a reviewing court need not analyze a defense counsel's strategic or tactical decisions if they are well within the range of professionally reasonable judgment. *Bradley*, supra.

In the case at bar, when defendant filed his petition for post-conviction relief, he incorporated all the exhibits he had filed in the trial court in support of his motion for leave to file motion for new trial instanter.[3] Months later, he also filed a

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[3] The trial court docket shows that the notice of incorporation was filed on the same date defendant filed the petition for post-conviction relief -- October 9, 2001.

supplemental memorandum adding several exhibits in support of the petition.

In all, the exhibits defendant presented dehors the trial record included the affidavits of Karra Vasquez, Becky Shaffer, Tammy Salopek, JoAnn Kitchen, her daughter Ashley Snyder, Tom Pavlish, defendant's private investigator, and defendant.

During the three-day hearing-on defendant's petition for post-conviction relief, these same affiants testified as witnesses. According to defendant, the testimony of these people is the evidence dehors the record that, had his trial counsel been competent, he would have obtained and presented as part of his defense at trial. Defendant also argued his trial counsel was ineffective because he elicited damaging and prejudicial hearsay testimony on cross-examination from one of the state's witnesses, social worker Sally Weindorf. In Ohio, it is well settled that,

> [t]he presentation of competent, relevant, and material evidence dehors the record may defeat the application of res judicata. See *State v. Smith* (1985), 17 Ohio St. 3d 98, 101, 17 Ohio B. Rep. 219, 221, 477 N.E.2d 1128, 1131-1132, fn. 1. However, a petition for postconviction relief is not the proper vehicle to raise issues that were or could have been determined on direct appeal. *State v. Perry*, supra, 10 Ohio St.2d at 182, 39 Ohio Op.2d at 193, 226 N.E.2d at 109. "Evidence presented outside the record must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of Perry by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis

> and a desire for further discovery." *Coleman*, supra, Hamilton App. No. C-900811, at 7. To overcome the res judicata bar, evidence offered dehors the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record. *Franklin*, supra, Hamilton App. No. C-930760, at 7.

State v. Lawson (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362, 368.

In the case at bar, when the trial court held its three-day hearing on defendant's petition for post conviction relief, it heard testimony from each of the affiants, other witnesses, and defendant's trial counsel, Donald Butler. The trial judge wrote a 29-page Findings of Fact and Conclusions of Law. In this very comprehensive document the trial court made the following factual determinations about the testimony it heard, in pertinent part:

> *A. Claim that Defense Counsel's Trial Preparation Was Lacking*
>
> *** Butler testified that after he was assigned to the case about six weeks after arraignment, he reviewed the Court's file, the clerk's office docket (H.Tr. 98; 100) met with his client, [sic] (H.Tr. 89-90), ascertained that his client would not sign a speedy trial waiver pursuant to the Court's concern about time (H.Tr. 94-95), and proceeded immediately to conduct research and prepare for trial. *** Butler filed the appropriate discovery motions *** [and] *** met with his client at subsequent scheduled pre-trials ***.
>
> ***

(C) [sic] Claim that Counsel Failed to Subpoena Certain Witnesses for Trial

*** The defendant claimed in his original petition that counsel was ineffective for failing to subpoena his wife, Mrs. Karra Vasquez, and his sister-in-law, Becky Shaffer. In his supplemental Memo., he added JoAnn Kitchen, Tammy Salopek, and Ashley Snyder as possible witnesses that should have been subpoenaed to testify.

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*** Butler explained that he didn't subpoena the family members because they were uncooperative and he had to keep in mind the other allegations of sexual molestation, specifically from his sister's daughter. *** He also had to be concerned that family members would be aware of the rape allegation by his client's four-year-old niece in California ***.

***

*** JoAnn Kitchen testified that she told Don Butler she wasn't at the Shaffer's the night of the rape or when [the victim] reported it, so she had nothing to testify to (H.Tr. 204; 219).

*** The defendant testified that while in County Jail, even he could not reach his wife, his sister-in-law Becky or his mother-in-law, JoAnn Kitchen: none of them responded *** [and] [h]is wife stopped visiting him ***.

***

(D) Claim that Witnesses who Were Not Subpoenaed Would Have Offered Substantive Evidence of Defendant's Innocence

* * *

Mrs. Karra Vasquez claimed she could not come forward at the time of the trial because social worker Sally Weindorf, nka Sally McHugh, and the Cleveland Police Department were plotting against her and her husband in this case. (H.Tr. 333; 335) [sic].

***

Mrs. Vasquez stated that she left phone messages for Don Butler that went unanswered, but admitted that within two weeks of her husband's arrest, she stopped visiting him in jail and *** did not attend the trial, the sexual predator hearing or the sentencing. (H.Tr. 329-330) [sic] .

Mrs. Vasquez testified that except for their children, her husband and [the victim] were alone in the basement of the Schaffer home [sic] is consistent with [the victim's] testimony ***.

Rebecca "Becky" Shaffer *** testified she and her husband had gone to bed and did not see the [victim or her mother and father] the night [the victim] stated that Robert Vasquez raped her (H.Tr. 247).

***

[S]he also suspected [defendant] of sexually abusing her son (H.Tr. 286-288).

***

Tammy Salopek testified she has known [the victim's father] since 1996 *** and knows Becky and Don Shaffer. (H.Tr. 143) [sic]. She testified that the three families often got

> together to socialize ***. She described [the victim's] character for trustworthiness and honesty by stating that she caught [the victim] lying to her on a few occasions and that she is not extremely trustworthy. (H.Tr. 147-148) [sic].
>
> ***
>
> Ashley Snyder, age 13, testified *** she knows [the victim] pretty well ***.
>
> She signed an affidavit saying that [the victim] tells a lot of stories ***. [The victim] slept over her house in August of 2000 during which time she was perfectly fine. (H.Tr. 170-171) [sic].
>
> ***
>
> *(E) Claim that Counsel Did Not Obtain A Speedy Trial Waiver*
>
> ***
>
> The defendant testified that he didn't sign the speedy trial waiver *** on the advice of a fellow inmate at the County Jail. ***
>
> Vasquez was banking on the case running out of time and decided to take that chance, as opposed to listening to his attorney. The fact that his choice in retrospect may not have [sic] beneficial to him does not render counsel ineffective.[4]

---

[4] During the post-conviction hearing, defendant also argued his trial counsel was ineffective because he advised him not to testify at trial. That issue is not part of this appeal because defendant has not made it part of any error he has assigned in this matter.

When it made its conclusions of law, the trial court stated, in part:

> The Court finds that neither the testimony from Donald Butler or any other witness, showed that Butler violated a professional duty as guaranteed by the Sixth Amendment to the United States Constitution or by Article I, Section 10 of the Ohio Constitution. Butler's testimony not only showed no failure in his obligation to prepare the case for trial in general, but specifically concerning the subpoenaing of witnesses, his testimony and that of others showed that defendant's family members refused to cooperate with the defense.
>
> ***
>
> Counsel is not ineffective for trying to contact defense witnesses who refused to respond or otherwise help in the defense. He is not ineffective for failing to subpoena witnesses whom he considers to be uncooperative and who refused to talk to him prior to trial-or in failing to subpoena witnesses to whom family members could have led him. He is not ineffective for failing to subpoena uncooperative witnesses who, in his experience and professional judgment, would not be of assistance to the defense.

The trial court further determined that the doctrine of res judicata barred defendant's arguments about his trial counsel's ineffectiveness for eliciting damaging and prejudicial hearsay testimony from social worker, Sally Weindorf. The court held that both issues were raised or could have been raised by defendant in his direct appeal in *Vasquez*.

During his post-conviction hearing, defendant presented numerous witnesses who did not testify at his trial. Their absence, however, does not demonstrate his counsel was ineffective and that the outcome of his trial would have been different had they been witnesses during his trial.

On the contrary, the record shows that none of defendant's witnesses offered any testimony to support defendant's theory of innocence. None of their testimony challenges the victim's account of the events leading to defendant's convictions. We agree with the trial court's conclusion that "not one of the witnesses who testified-neither the defendant, his family or others-offered any testimony that could have changed the outcome of defendant's trial.,' Trial Court Findings of Fact and Conclusions of Law, p. 25.

We are also unpersuaded by plaintiff's claim that his counsel was ineffective because he was overworked and too busy to properly defend him at trial. We have already determined that none of defendant's evidence dehors the record, namely, the witnesses who testified at the post-conviction hearing, would have changed the outcome of his trial. Whether his schedule was busy or not, we find no evidence that his counsel failed to fully defend defendant at trial.

For the foregoing reasons, the trial court did not abuse its discretion when it denied his petition for post conviction relief. Defendant's first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN THE COURT DENIED APPELLANT'S MOTION

FOR LEAVE TO FILE MOTION FOR NEW TRIAL AFTER APPELLANT PRESENTED NEWLY DISCOVERED EVIDENCE IN HIS CASE.

Defendant argues the trial court erred in denying him leave to file a motion for new trial instanter, because he presented new evidence dehors the record in that motion. We disagree.

> A defendant seeking a new trial based on the ground of newly discovered evidence bears the burden of demonstrating to the trial court that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370; *Hawkins*, supra at 350.

State v. Blalock, Cuyahoga App. Nos. 82080, 82081, 2003-Ohio-3026, at ¶7.

Because we have already determined that the outcome of defendant's trial would not have been different had the various post-conviction witnesses testified at his trial, we conclude that defendant is therefore not entitled to a new trial.

Defendant's motion for leave to file motion for new trial instanter contains the same arguments and evidence dehors the record he used to support his petition for post-conviction relief. Accordingly, we overrule defendant's third assignment of error for the same reasons explained earlier.

FOURTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN THE TRIAL COURT QUASHED APPELLANT'S SUBPOENA FOR THE TESTIMONY OF THE COMPLAINING WITNESS.

Defendant claims the trial court erred in quashing a subpoena for the victim to testify at his post conviction hearing. Defendant maintains he was entitled to question the victim about whether she had made a prior and false allegation of sexual abuse against her uncle.

In *State v. Boggs* (1992), 63 Ohio St.3d 418, 588 N.E.2d 813, the Ohio Supreme Court addressed the question of "whether an alleged victim in a sexual assault case can be cross-examined as to prior false accusations of rape." Id., at 421. In response to this question, the Supreme Court of Ohio held:

> When the defense seeks to cross-examine on prior false accusations of rape the burden is upon the defense to demonstrate that the accusations were totally false and unfounded. Hence the initial inquiry must be whether the accusations were actually made by the prosecutrix. Moreover, the trial court must also be satisfied that the prior allegations of sexual misconduct were actually false or fabricated. That is, the trial court must ascertain whether any sexual activity took place, i.e., an actual rape or consensual sex. If it is established that either type of activity took place, the rape shield statute prohibits any further inquiry into this area. Only if it is determined that the prior accusations were false because no sexual activity took place

would the rape shield law not bar further cross-examination.

Id., at 423

In the case at bar, defendant called Ashley Snyder on direct examination in order to establish that the victim had made a prior and false accusation that her uncle had raped her. At the hearing, Ashley Snyder testified about what the victim had told her about her uncle

> Q: Do you know whether or not, or since that conversation, and since the time you talked to [the victim] about this incident that occurred in this basement with this fella that liked her and that who she liked, did she ever tell you anything else about some bad things that occurred to her?
>
> A: Yes.
>
> Q: What did she tell you? And I want to remind you. You understand how serious this is in this courtroom. So I want to remind you that we want you to tell us exactly what was said, and I want this to be the truth.
>
> ***
>
> A: I remember her telling me that - well, we were in the water at the beach. I asked her why all the adults were like talking about something, and I wanted to know what they were talking about. And she told me that while she was in New York for three weeks, I think, that she was molested. And she said that she was molested by her uncle. And she told me that he fingered her. That's all she really said.

> Q: You met with some guy by the name of Tom Pavlish. Remember? He is the private investigator?
>
> A: Yes.
>
> Q: He presented you with an affidavit. Remember that?
>
> A: Yes.
>
> ***
>
> Q: And in that affidavit there was some information about your conclusion that [the victim] tells a lot of stories. Yes?
>
> A: Yes.
>
> Q. Why would you say that?
>
> A. Because like a lot of times that she has came over my house, her and my sister have like fought, like argued, and I could have been like standing right there and she could have did something and she would like lie right to my face and say that she didn't do it. And she did that very often.

In the case at bar, Ashley Snyder's testimony fails to demonstrate that the victim's accusations about having been raped by her uncle were totally false and unfounded. Ashley Snyder's testimony casts doubt generally on the victim's veracity only in this case. Ms. Snyder said nothing about the victim ever admitting she had lied about what she told her about her uncle. Defendant has not shown that the molestation the victim described to her was false or unfounded

Accordingly, under the evidentiary requirements set forth in Boggs, the trial court did not err in quashing the defendant's request to

subpoena the victim to testify at the post conviction hearing. Defendant's fourth assignment of error is without merit.

> FIFTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN THE TRIAL COURT DENIED APPELLANT'S MOTION TO PLACE THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES RECORDS THAT HAD BEEN GIVEN TO THE PROSECUTOR UNDER SEAL FOR APPELLATE REVIEW.

Defendant further argues the trial court erred in conducting its own in camera inspection of the prosecutor's file from the Department of Children and Family Services and then denying his request to include that file as part of this appeal.

After conducting its inspection of the prosecutor's entire file, the trial court concluded that neither it nor the agency file from the Department of Children and Family Services contained any exculpatory material.[5] Without specifying what he believes to be part of that file, defendant nonetheless maintains that it must include something exculpatory.

Because defendant failed to object during the post conviction hearing, he has now waived all but plain error with respect to these matters. He must show, therefore, that, but for the alleged errors, the outcome of his trial clearly would have been otherwise. *Brady v. Maryland* (1963), 373 U.S. 83,

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[5] Tangentially, defendant is arguing the prosecutor's file should have been made available to him during his trial.

83 S.Ct. 1194, 10 L.Ed.2d 215; *State v. Chinn*, (1999), 85 Ohio St.3d 548, 1999-Ohio-288, 709 N.E.2d 1166.

First, he has not shown that the purportedly exculpatory material was not available to him during the pendency of his direct appeal. Accordingly, this argument is now barred under the doctrine of res judicata. *Rakoczy*, supra.

Second, defendant fails to point to anything in the record showing that the file contained anything exculpatory. We reject, therefore, defendant's reliance upon *State v. Gau*, (Dec. 11, 1998), Lake App. No. 97-L-197. In that case, the defendant actually produced evidence tending to show the state failed to turn over evidence that might have been exculpatory in nature. Defendant has not presented any evidence dehors the record that even resembles the exculpatory evidence presented in *Gau*.

Moreover, we reject defendant's claim that the trial court erred in failing to include this file under seal to allow this reviewing court to conduct that inspection. Defendant does not cite nor do we find any authority for defendant's position. To the contrary, a trial court is well within its authority to conduct an in camera inspection of any documents that may contain exculpatory material. An in camera inspection for exculpatory material is part of a trial court's responsibilities. *State v. Lawson* (1992), 64 Ohio St.3d 336, 595 N.E.2d 902; *State v. Hood*, Cuyahoga App. No. 80294, 2002-Ohio-4081.

For the foregoing reasons, we find no plain error and defendant's fifth assignment of error is therefore overruled.

Judgment accordingly.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA A. BLACKMON, P.J., AND

TIMOTHY E. MCMONAGLE, J., CONCUR.

s/DIANE KARPINSKI, JUDGE

Filed and Journalized per App. R. 22(E) Jan 20, 2004

Announcement of decision per App. R. 22(B), 22(D) and 26(A) received January 8, 2004

N.B. This entry is an announcement of the court's decision. See App.R. 22 (B) , 22 (D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22 (E). See, also, S.Ct.Prac.R. 11, Section 2 (A) (1).

APPENDIX E

IN THE COURT OF COMMON PLEAS
COUNTY OF CUYAHOGA, OHIO
CRIMINAL DIVISION

Case No. CR 394976
Judge Robert Glickman

STATE OF OHIO,

Plaintiff-Respondent,

-vs-

ROBERT VASQUEZ,

Defendant-Petitioner,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Filed: December 6, 2002

Defendant-petitioner, Robert Vasquez, filed a Petition for Post-conviction Relief pursuant to R.C. 2953.21 on October 9, 2001, alleging that:

(1) he was denied his constitutional right to the effective assistance of counsel for counsel's failure to investigate for, and to subpoena for trial, two defense witnesses, defendant's wife, Mrs. Vasquez Vasquez, and defendant's sister-in-law, Rebecca Schaffer;

(2) he was denied the right to effective assistance of counsel at trial as a result of:

(a) cross examination of State's witness Social Worker Sally Weindorf at

> Tr. 264 where she explains whose homes she has investigated as a result of this complaint, and defense counsel asked "Who are all these people?";
>
> (b) cross-examination of Sally Weindorf wherein defense counsel elicited alleged prejudicial hearsay testimony concerning a child abuse investigation of the Vasquez family in Nevada.

A Supplemental Memorandum to the petition, filed with leave of court, included supporting affidavits to both the petition from the following individuals: Mrs. Vasquez Vasquez, defendant's wife, Rebecca "Becky" Shaffer, his sister-in-law, JoAnn Kitchen, his mother-in-law, Tammy Salopek and her daughter Ashley Snyder, and defendant's private investigator, Tom Pavlish, as well as defendant's own affidavit. Also attached was a copy of a City of Cleveland Emergency Medical Services report dated August 4, 2000, which was appended to Pavlish's affidavit, as well as 'witness summaries' of proposed testimony from attorneys Pat D'Angelo, Donald Butler and Richard G. Lillie. Defendant referenced, but did not append to either the motion or the petition, defendant's defense file compiled by Donald Butler, unidentified fee bills, and unidentified jail visitation records. The defendant's claims at the hearing were that Donald Butler should have prepared the case better/differently, should have subpoenaed certain witnesses, should have allowed the defendant to testify and not advised defendant not to testify on his own behalf, and should not have cross-examined Sally Weindorf as he did. On May 14-17, 2002, the trial court conducted a hearing on this matter. Upon review of the files and records in

this case, the Court makes the following Findings of Fact and Conclusions of Law:[1]

Findings of Fact

1. Defendant-petitioner Robert Vasquez, hereinafter "defendant", was convicted by a jury of one count of rape of a minor under age 13, R.C. 2907.02, and one count of kidnapping, R.C. 2905.01. The victim in each count was Ashlee Loomis. He was sentenced to life in prison for the rape and nine years for the kidnapping, to be served concurrently.

2. The defendant appealed, claiming that his convictions were against the manifest weight of the evidence, hearsay evidence was admitted in violation of Evid.R. 807, and defense counsel was ineffective for failing to investigate the case for the existence of witnesses and to object to hearsay, and for eliciting prejudicial testimony on cross-examination of social worker Sally Weindorf, specifically at Tr. 264-267. During the pendency of his appeal, defendant filed a Motion for Leave to File Motion for New Trial Instanter, as well as a petition for post-conviction relief pursuant to R.C. 2953.21. Defendant was represented by Donald Butler at trial and on appeal by Mark B. Marein, Steven L. Bradley and Mary Jo Tipping who also filed the new trial motion and the post-conviction petition.

3. The Eighth District Court of Appeals affirmed defendant's convictions. See *State v. Robert Vasquez* (Nov. 1, 2001), Cuy. App. No. 79319, 2001 WL 1352781.

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[1] References to the trial transcript appear as "Tr. T." and references to the hearing transcript as "H.Tr.".

4. R.C. 2953.21 governs petitions for post-conviction relief. R.C. 2953.21(A) states that "[a]ny person who has been convicted of a criminal offense *** and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon ***".

5. A petition under division (A)(1) is timely filed if filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction. R.C. 2953.21(A)(2).

6. The Court finds that this is the first petition under R.C. 2953.21 filed by defendant in CR 396478.

7. If timely filed, a Court must then determine whether or not the petition provides substantive grounds for a hearing. R.C. 2953.21(C). A post-conviction petitioner bears the initial burden of submitting evidentiary documents containing sufficient operative facts to demonstrate his claims and to merit a hearing. *State v. Jackson* (1980), 64 Ohio St. 2d 107; *State v. Pankey* (1981), 68 Ohio St. 2d 58. A petition that does not present substantive grounds is subject to dismissal without a hearing. R.C. 2953.21(E); *State v. Calhoun* (1999), 86 Ohio St. 3d 279.

8. The Court finds that under the doctrine of *res judicata*, constitutional issues cannot be considered in post-conviction proceedings brought pursuant to R.C. 2953.21 where they have already or could have been fully litigated by the defendant either before his conviction or in a direct appeal. *State v. Perry*

(1967),10 Ohio St. 2d 175; *State v. Bates* (Jan. 21, 1999), Cuy. App. No. 75093.

9. The only exception to the applicability of the *res judicata* bar is where the petitioner presents competent, relevant and material evidence *dehors* the record that was not in existence and available to petitioner in time to support the direct appeal and file a timely petition. *State v. Lawson* (1995), 103 Ohio App. 3d 307, 315.

10. In order to demonstrate substantive grounds for relief and to warrant a hearing in a claim of trial counsel's ineffectiveness according to the United States Supreme Court, a petitioner is required to demonstrate that (I) the performance of defense counsel was seriously flawed and deficient, and (2) the result of petitioner's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 688. The Ohio Supreme Court requires essentially the same: a petitioner must demonstrate that defense counsel substantially violated one or more of his essential duties to a client and that the violation prejudiced the defense. *State v. Hester* (1976), 45 Ohio St. 2d 71; accord, *State v. Lytle* (1976), 48 Ohio St. 3d 391, 396-397, vacated in part on other grounds (1978), 438 U.S. 910; *State v. Bradley* (1989), 42 Ohio St. 3d 136, at syllabus, cert. denied (1990), 497 U.S. 1011; *State v. Jackson* (May 2, 1996), Cuy. App. No. 69501, 1996 WL 221174. Even where a court determines that counsel's performance is below the standard expected, a conviction may not be overturned unless there was an effect on the conviction. *State v. Goodwin* (May 27, 1999), Cuy. App. No. 72043, 1999 WL 342305.

11. When reviewing a claim of ineffective assistance of counsel, this Court must presume that

a properly licensed attorney has executed his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St. 3d 98. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie* (1998), 81 Ohio St. 3d 673, 674. "Decisions regarding the calling of defense witnesses are within the purview of defense counsel's trial tactics." *State v. Vasquez,* Cuy. App. No. (Nov. 1, 2001), Cuy. App. No. 79319, 2001 WL 1352781 at **3, citing *State v. Coulter* (1992), 75 Ohio App. 3d 219, 230. Trial counsel does not violate a duty to a client by mere failure to subpoena a witness for trial unless it can be shown that some prejudice resulted. "In order for such a failure to constitute ineffective assistance' of counsel, a defendant must demonstrate that the subpoenaed information would have been of significant assistance to the defense." *State v. Fussell,* (May 20, 1999), Cuy. App. No. 73713, 1999 WL 322705, quoting *State v. Reese* (1982), 8 Ohio App. 3d 202,203; see also *O'Malley v. U.S.* (1961), 285 F.2d 73. In order to demonstrate a claim of trial counsel's ineffectiveness according to the United States Supreme Court, a post-conviction petitioner is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of petitioner's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 688. The Ohio Supreme Court requires essentially the same: a petitioner must demonstrate that defense counsel substantially violated one or more of his essential duties to a client and that the violation prejudiced the defense. *State v. Hester* (1976), 45 Ohio St. 2d 71; accord, *State v. Lytle* (1976), 48 Ohio St. 3d 391, 396-397, vacated in part on other grounds (1978), 438 U.S. 910; *State v. Bradley* (1989), 42 Ohio St. 3d

136, at syllabus, cert. denied (1990), 497 U.S. 1011; *State v. Jackson* (May 2, 1996), Cuy. App. No. 69501, 1996 WL 221174.

12. When reviewing a claim of ineffective assistance of counsel, this Court must presume that a properly licensed attorney has executed his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St. 3d 98. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie* (1998), 81 Ohio St. 3d 673, 674. For example, "[d]ecisions regarding the calling of defense witnesses are within the purview of defense counsel's trial tactics." *State v. Vasquez,* Cuy. App. No. (Nov. 1, 2001), Cuy. App. No. 79319, 2001 WL 1352781 at **3, citing *State v. Coulter* (1992), 75 Ohio App. 3d 219, 230. Trial counsel does not violate a duty to a client by mere failure to subpoena a witness for trial unless it can be shown that some prejudice resulted. "In order for such a failure to constitute ineffective assistance of counsel, a defendant must demonstrate that the subpoenaed information would have been of significant assistance to the defense." *State v. Fussell, (May* 20, 1999), Cuy. App. No. 73713, 1999 WL 322708, quoting *State v. Reese* (1982), 8 Ohio App. 3d 202, 203; see also *O'Malley v. U.S.* (1961), 285 F.2d 73.

13. Claims in a petition for post-conviction relief may not be considered at all where they are *res judicata. State v. Perry* (1967), 10 Ohio St. 2d 175; *State v. Reynolds* (1997), 79 Ohio SH. Tr. 3d 158; *State v. Powell* (1993), 90 Ohio App. 3d 260. "*Res Judicata* extends to bar not only claims which were actually litigated, but "every question which might properly have been litigated." *Stromberg v. Bratenahl Bd. of Edn.* (1980), 64 Ohio St. 2d 98.

14. The only exception to the applicability of the *res judicata* bar is where the petitioner presents competent, relevant and material evidence *dehors* the record that was not in existence and available to petitioner in time to support the direct appeal and file a timely petition. *State v. Lawson* (1995),103 Ohio App. 3d 307, 315. Essentially, a petitioner is required to present evidence demonstrating that he could not have advanced the claims on appeal based upon the information contained in the original trial record. *State v. Combs* (1994), 100 Ohio App. 3d 90, 97. The evidence must be genuinely material and relevant. *Id.* "General conclusory allegations", without a showing of prejudice are inadequate to even impose a hearing. *State v. Jackson* (1980), 64 Ohio St. 2d 107 at 111-112; *State v. Apanovitch* (8th D., 1995), 107 Ohio App. 3d 82, at 99; *State v. Poland* (8th D., 1984), 16 Ohio App. 3d 303, 305; see also *Rivera v. United States* (C.A.9, 1963), 318 F.2d 606. Thus, where supporting documentary evidence, and the files and records of the case do not show entitlement to relief, a petition for post-conviction relief is subject to dismissal. R.C. 2953, 21(E); *Calhoun.*

A. Claim that Defense Counsel's Trial Preparation Was Lacking

15. With respect to his pre-trial activity and preparation of the case, Butler testified that after he was assigned to the case about six weeks after arraignment, he reviewed the Court's file, the clerk's office docket (H.Tr. 98; 100) met with his client, (H.Tr. 89-90), ascertained that his client would not sign a speedy trial waiver pursuant to the Court's concern about time (H.Tr. 94-95), and proceeded immediately to conduct research and prepare for trial. (H.Tr. 102-106). He conducted research on a

number of issues relative to child rape cases such as competency, child victims, hearsay and on child rape cases in general, and pulled his own discovery and child rape files. (H.Tr. 102-106). None of the research precipitated the filing of any specific pre-trial motions. (H.Tr. 105). Butler filed the appropriate discovery motions (H.Tr. 98; 100; 102) and conducted further pre-trials, even meeting with the prosecutor for pre-trial meetings that were not scheduled by the Court. (H.Tr. 110-111). He met with his client at subsequent scheduled pre-trials for between 15 and 25 minutes (H.Tr. 107-110) and at the County Jail (H.Tr. 122-124). He made notes in his file to check on the outcome of DNA testing, which he discussed with the prosecutor at pre-trials (H.Tr. 130) and why the victim waited 10 days before reporting (H.Tr. 122-123).

(B) Claim that Counsel Did Not Cross-examine Victim Regarding EMS "Run Sheet"

16. At the hearing, Butler was presented with an unauthenticated copy of an Emergency Medical Services 'run report' of the evening that Ashlee Loomis was transported to the hospital. The defendant asked questions of Butler concerning the fact that an unidentified person wrote thereon: "pt.st. he put it in her". Apparently defendant was attempting to show, as he claimed via his Investigator's affidavit in his Supplement, that this notation "is in complete contradiction to [Ashlee's] trial testimony". Tom Pavlish's Affidavit at para. 4. Butler testified that his understanding of this case was that it was oral sex, more specifically, that Ashlee accused the defendant of putting his tongue in her - he had no information that it was anything else.

17. Mr. Pavlish states in his affidavit that information in the EMS report also states "pt. st. she took a shower later that day" is inconsistent with Stephen Loomis's testimony that "immediately after the incident Ashlee fell asleep in his truck during the drive home and that he carried her into his home as she slept". Tom Pavlish's Affidavit at para. 6. At the hearing, counsel asked Butler questions concerning this notation, to which Butler replied that the night Ashlee was transported, she had reported an incident that took place two weeks prior. (H.Tr. 132).

18. Relevant to the above is trial testimony from the victim Ashlee Loomis:

> Q: "Ash, you'll have to tell us what happened when you went into the basement."
>
> THE COURT: "Just take your time. Nobody's here to hurt you. Think about it."
>
> A: "He - was licking my private spot."
>
> (T.Tr. 39)
>
> ***
>
> Q: "Now, Ashlee, can you stand up and tell us where your private spot is?"
>
> A: (indicating) "Here."
>
> MS. TRAVIS: Your honor, may the record reflect that she's pointed to her vaginal area?
>
> THE COURT: So order. (sic) Granted.
>
> (T.Tr. 42.)
>
> ***
>
> Q: "Ashlee, what was he licking your private spot with?"

A: "His tongue."

Q: "And did he touch you inside or outside or both?"

A: "Both"

(T.Tr. 46.)

Also relevant is trial testimony from Steve Loomis on direct examination:

Q: And did you go home at that point?

A: Yes, ma'am.

Q: All right. Anything happen on the way home?

A: No, ma'am.

Q: Did Ashlee tell you anything that evening?

A: No, ma'am. She was actually, she appeared to be sleeping by the time I got to the truck.

Q: Okay.

A: So she was sleeping by the time we got home.

Q: Now, the next day, which would be July 24th, do you recall that day?

(T.Tr. 126).

(C) Claim that Counsel Failed to Subpoena Certain Witnesses for Trial

19. The defendant claimed in his original petition that counsel was ineffective for failing to subpoena his wife, Mrs. Karra Vasquez, and his sister-in-law, Becky Shaffer. In his Supplemental Memo., he added JoAnn Kitchen, Tammy Salopek, and Ashley Snyder as possible witnesses that should have been subpoenaed to testify.

20. Butler testified to receiving a letter from the defendant that stated "his wife and mother-in-law...had information pertinent to some things he thought the victim's father was into...[and which]...would discredit the father and the little girl." Butler explained that they were not identified as witnesses, but people he could talk to get information relative to the case; the only witness Vasquez identified was his wife's sister "who was in college and was supposedly in trouble with American On Line or some internet activity between the victim's father and herself." (H.Tr. 115-116). Vasquez gave Butler his mother-in-law's telephone number to contact Vasquez's wife. After several attempts and no answers, finally, a woman who identified herself as the mother of Vasquez's wife answered the phone and said that Vasquez's wife did not live there or if she lived there Butler could not talk to her and "no one in the family was going to talk to me about this case." Butler further explained that she stated that "they were going to do everything they could to make sure that he stayed away from her daughter...because since he was in jail, she had found out, I guess from her daughter, that Vasquez had been abusing her for some extended period of time. And they weren't going to do anything for him." (H.Tr. 117-118). Butler explained that he had no way of contacting Vasquez's wife except through her mother, and her mother told Butler she would not have her daughter return the call. (H.Tr. 118). Mrs. Vasquez never called Butler (H.Tr. 118-119). Butler asked Mrs. Vasquez's mother, JoAnn Kitchen for the phone number for her daughter in college, but she refused. (H.Tr. 119). Butler told his client that his mother-in-law would not let him talk to his wife. (H.Tr. 119-120). Butler also stated that he never received a telephone

message from Mrs. Vasquez (H.Tr. 118). Butler stated that Becky never contacted him, which is what she stated as well. (H.Tr. 121; 262).

21. Butler explained that he didn't subpoena the family members because they were uncooperative and he had to keep in mind the other allegations of sexual molestation, specifically from his sister's daughter. (H.Tr. 138). He said that in his career he has often experienced uncooperative witnesses and that he is very leery of putting uncooperative witnesses on the stand to testify. (H.Tr. 139). He also had to be concerned that family members would be aware of the rape allegation by his client's four-year-old niece in California, a fact that came out at the sexual predator hearing. (H.Tr. 138).

22. Detective Chappelle, a 20-year veteran of the Cleveland Police Department (H.Tr. 417), testified for the State that he investigated the rape complaint by Ashlee Loomis (H.Tr. 418). He stated that during the course of his investigation, he also attempted to contact Mrs. Vasquez by telephone twice and talked to her parents. (H.Tr. 423). He left a message for Mrs. Vasquez at her mother's home, but Mrs. Vasquez never called him; he never spoke to her and was unable to contact her. (H.Tr. 425; 426).

23. Mrs. Vasquez testified testified that she did nothing to communicate the information she had about her husband's case, i.e., what she testified to at the hearing, to anyone after she stated she could not reach Don Butler. (H.Tr. 328). Mrs. Vasquez explained that she left telephone messages for Don Butler but he never called her and she assumed the police would call *her* (H.Tr. 321; 326).

24. JoAnn Kitchen testified that she told Don Butler she wasn't at the Shaffer's the night of the

rape or when Ashlee reported it, so she had nothing to testify to (H.Tr. 204; 219).

25. The defendant testified that while in County Jail, even he could not reach his wife, his sister-in-law Becky or his mother-in-law, JoAnn Kitchen: none of them responded to his several attempts to reach them by mail and by telephone. (H.Tr. 365-366). His wife stopped visiting him and he felt as if his family had abandoned him. (H.Tr. 366). He could not reach them during the trial or at the time of sentencing or while at prison, either. (H.Tr. 367). After he was convicted, JoAnn Kitchen's and his wife's telephone numbers had been changed and/or they refused to accept his collect calls from prison. (H.Tr. 357-358). It wasn't until Vasquez contacted *his* sister Theresa Tragillo in Pacifica, California, that the instant proceedings were initiated. (H.Tr. 358). Vasquez explained that he felt Butler should have been able to contact his family even though they refused to return his calls and letters, too. (H.Tr. 382-383).

26. Out of the three *family* members whom the defendant had testify for him at the instant hearing, two testified that they neither attended the trial, the sexual predator hearing or the sentencing - these were his wife, Mrs. Vasquez (H.Tr. 329-330) his mother-in-law, JoAnn Kitchen (T. 206), and the third witness, defendant's sister-in-law Rebecca "Becky" Shaffer, was in the courthouse prepared to testify as a State's witness, but did not. (H.Tr. 264-265).

(D) Claim that Witnesses who Were Not Subpoenaed Would Have Offered Substantive Evidence of Defendant's Innocence

27. The following is testimony of defendant's witnesses at the hearing that he claims would have

been offered at trial had Attorney Butler subpoenaed them:

Mrs. Karra Vasquez

Mrs. Karra Vasquez claimed that she could not come forward at the time of the trial because Social Worker Sally Weindorf, nka Sally McHugh, and the Cleveland Police Department were plotting against her and her husband in this case. (H.Tr. 333; 335). Mrs. Vasquez stated that Sally threatened to take away her children if she cooperated in Robert's defense. (H. Tr. 319-320). She stated that Sally told her that Sally knew Steve and socialized with him. (H.Tr. 333). Although she came forward for this hearing, Mrs. Vasquez testified that Sally never revoked the threat to remove her children. (H.Tr. 331- 332). Mrs. Vasquez claimed that she tried to contact Don Butler about her husband's case, yet she did not explain why she was trying to contact him if she felt that she could not testify because of Sally's threat to take away her children. Mrs. Vasquez stated that she left phone messages for Don Butler that went unanswered, but admitted that within two weeks of her husband's arrest, she stopped visiting him in jail and thereafter did not attend the trial, the sexual predator hearing or the sentencing. (H.Tr. 329-330).

Mrs. Vasquez testified that except for their children, her husband and Ashlee were alone in the basement of the Schaffer home is consistent with Ashlee's testimony that other than the Vasquez's two infant children, she was alone with the defendant in the Schaffer's basement on July 23rd. (H.Tr. 304-305; T.Tr. 38; 48). Mrs. Vasquez stated that Ashlee's clothes were not disheveled when Ashlee came up from the basement is also consistent with Ashlee's testimony that she herself pulled up her underwear

and pants when her father called her to come upstairs (H.Tr. 306; T.Tr. 47-48).

Mrs. Vasquez testified that on the night of August 4th, Steve Loomis talked to Ashlee in the presence of his partner and told her "you have to get this right...you have to make sure that you know exactly what you are going to say and repeat this to every person that asks you...You can't change your mind." (H.Tr. 305; 315-316). Mrs. Vasquez explained that she was getting angry and interjected and told Steve that he couldn't tell her what to say. The police arrived thereafter. (H.Tr.316).

JoAnn Kitchen, Karra Vasquez's Mother

Mrs. Kitchen is the defendant's mother-in-law. Mrs. Vasquez's mother testified that she would not characterize what Sally told her daughter Karra as a "threat" and stated that nothing prevented her from reporting to CCDHS or the police that Karra may have perceived such a threat. (H.Tr. 202; 213; 219). JoAnn Kitchen also denied that Sally Weindorf threatened her daughter Mrs.-Vasquez with removal of her children if Mrs. Vasquez assisted in her husband's defense. (H.Tr. 202; 213; 219). She admitted that she was not present at the Shaffer home the night Ashlee was raped, nor was she present the night Ashlee reported the rape. (H.Tr. 219). Therefore, she has no testimony that could have changed the outcome of the trial. Mrs. Kitchen stated that she thought Ashlee needed more attention than her other grandchildren (H.Tr. 195-196). She later admitted that in her experience as a mother and grandmother, this is not unusual for a child without a mother in the home. (H.Tr. 209).

Rebecca Schaffer, Karra Vasquez's sister

Rebecca "Becky" Shaffer was at home, but was in bed the evening that Ashlee testified she was raped by Robert Vasquez (H.Tr. 245-246). She testified that she and her husband had been close friends of Steve, Ashlee and Kaylee Loomis (H.Tr. 236-242) and explained that she and her husband had gone to bed and did not see the Loomis' the night Ashlee stated that Robert Vasquez raped her (H.Tr. 247). The night that Ashlee reported the rape, her husband called her home from work and she arrived after the police and ambulance personnel (H.Tr. 250-252). She talked with a police captain and Steve Loomis and they said that she should have her son checked out, so she and her son Aaron went in the ambulance with Steve and Ashlee (H.Tr. 253-254). She explained that she did not observe Ashlee crying or upset and asked if she was going to be on TV. (H.Tr. 254-255). She thought this was odd because Ashlee craved attention and she was being taken to a hospital. (H.Tr. 265-66). Ashlee was getting a lot of attention and everybody was fussing, which she enjoyed. (H.Tr. 255-56). All of them were together in an exam room when Ashlee was questioned by a doctor and Steve was telling Ashlee to "tell them what happened" (H.Tr. 258). Becky was also interviewed by Sally Weindorf of CCDHS who stated that Mrs. Vasquez's kids could be taken away "because of drug use and things like that" (H.Tr. 261). Becky was subpoenaed by the stated to testify, but sat outside the courtroom for three days after which Prosecutor Lynn Travis asked her if Steve had sent her any e-mails and if she was aware that Steve had been kicked off of AOL and then sent her home. She did not testify. (H.Tr. 264-265).

On cross, Becky admitted that her son had been bleeding from the rectum but claimed this had been a problem and the Police Captain and Steve told her to take her son in the ambulance, even though this was a problem that he had been to the doctor for (H.Tr. 273-274). She stated at first that she did not tell the hospital that she suspected her son had been sexually abused, (H.Tr. 274), but later admitted that she reported to the hospital that she had come in with Ashlee Loomis, who reported that she was raped by Robert Vasquez, who lived in Shaffer's home and that she wanted to see if her son had also been abused. (H.Tr. 274-275; 277). Becky also admitted that Ashlee was laughing in the ambulance in response to, and because the ambulance attendants were making her laugh in an effort to put her at ease. (H.Tr. 276-277). She agreed that she observed an EMT had even put a glove on his head to joke with her. (H.Tr. 276).

She also stated that her statement in her affidavit that at the hospital "Steve was allowed to complete Ashlee's sentences, to fill in words for her, and manipulate the situation" (H.Tr. 281) really only involved Steve suggesting to Ashlee that she tell the doctor about a light over the bed in the Shaffer home (H.Tr. 28 I-283). Ms. Shaffer stated that a tall, black older detective took a written statement from her husband Don at their Gino Avenue home thereafter, but she could not remember if she gave a written statement. (H.Tr. 285). She stated that she told the detective that Ashlee was excited by all the attention in the ambulance and was not crying or upset, but did not tell the detective that she was laughing or joking, and did not tell the detective that she also suspected Robert of sexually abusing her son (H.Tr. 286-288).

Tammy Salopek, Becky Schaffer's friend

Tammy Salopek testified that she has known Steve Loomis since 1996 from working at Fagan's and knows Becky and Don Shaffer. (H.Tr. 143). She testified that the three families often got together to socialize and that Kaylee and Ashlee, Steve's children, often stayed at her home in the summer of 2000. (H.Tr. 143-144). Steve was a good friend. (H.Tr. 146). Tammy described Ashlee Loomis as "high-strung" and having "a lot of energy" (H.Tr. 147). She described Ashley's character for trustworthiness and honesty by stating that she caught Ashlee lying to her on a few occasions and that she is not extremely trustworthy. (H.Tr. 147-148). Ashlee caused trouble, she over exaggerates things, she would not take what Ashlee says at face value. (H.Tr. 149). Tammy explained that when she wrote in her affidavit that "Ashlee is starved for attention", she meant that she is very melodramatic, very manipulative as far is her father is concerned, has a tantrum if things don't go her way, and acts out over it. She wants to be the center of attention and although all kids have their moments, this is unique to Ashlee. (H.Tr. 150). Tammy's own two children were sexually molested by their step grandfather, who was prosecuted, but plea-bargained because she did not want her children to testify. (H.Tr. 151). Steve told Tammy about the accusation lodged by Ashlee on Friday, August 4th and Ashlee stayed at Tammy's house the next three or four days. Although she knew Steve trusted her and she had no men in her house, she though was kind of a little bit unusual because she didn't let her kids go anywhere. (H.Tr. 153-155). During this time, Ashlee had no trouble sleeping, she acted normally, fighting with the kids, running around, getting ice cream from the ice cream man. (H.Tr. 155). She does not know

Robert Vasquez. (H.Tr. 156). In answer to why Tammy appeared in court, she answered "because I got a subpoena". (H.Tr. 155-156). Upon further questioning, she stated that she is in court because Vasquez's private investigator told her that he got a life sentence and she couldn't believe that because there was physical evidence for what happened to her girls and that guy got only 10 years, and will be out in 4 and it was a very unfair sentence. (H.Tr. 157). Upon further questioning, she stated that she would not blame anybody for anything that Ashlee had told her because she is not believable all of the time. (H.Tr. 158).

On cross-examination, Tammy testified that she did not come forward to tell anyone about what she knew, even though she realized through her own children's experience that there was a possibility that court action would ensue from Ashlee's complaint. (H.Tr. 159-160). She did not do so because she asked Steve if it had really happened, to which he got upset, and they stopped talking. (H.Tr. 159-160). She admitted that she herself has lied and that she has caught her own children in lies. She stated that her children have had tantrums and have vied for her attention. (H.Tr. 160-161). She stated that Ashlee is much like her nine-year old daughter in that they are very girly and like dressing up, her daughter exaggerates and tells things that did not exactly happen that way. She stated that pretty much all kids exaggerate at some point in time. (H.Tr. 161-162). Tammy testified that it is not a problem to her that the man who molested her own two children got only six years, but the man who molested Ashlee got life. (H.Tr. 163). Tammy testified on re-direct that anytime she caught Ashlee doing anything, she would exaggerate. (H.Tr. 164).

Ashley Snyder, Tammy Salopek's daughter

Ashley Snyder, age 13, testified that she feels she knows Ashlee Loomis pretty well and likes both her and her sister Kaylee, whom she is better friends with. (H.Tr. 165-167). Since the Court ruled that the defendant had not presented a proper foundation for the introduction of evidence concerning a prior false rape accusation, testimony from this witness regarding same is inapplicable in this analysis.

She signed an affidavit saying that Ashlee Loomis tells a lot of stories because she has come over to her house and Ashlee and her sister have fought while Snyder was there and Ashlee would lie to her face and say she didn't do it. (H.Tr. 170-171). Ashlee slept over her house in August of 2000 during which time she was perfectly fine. (H.Tr. 170-171).

28. In response to the claims that the above witnesses would have offered substantive testimony of defendant's innocence, the State offered the following testimony:

> (a) Detective Chappelle testified that he took a written statement from Mr. Shaffer in their Gino Avenue home while Rebecca was there (H.Tr. 419). He spoke to Ms. Shaffer, but she declined to make a written statement (H.Tr. 420; 423). Ms. Shaffer read Don Shaffer's statement, and added nothing that was significant to the case. (H.Tr. 420-421). Ms. Shaffer did not tell the Detective that her son was bleeding rectally and that she suspected Robert Vasquez had caused that, but he found that out in his investigation (H.Tr. 421-422); she did not tell the Detective that her son was examined at Metro, but the Detective was aware of that (H.Tr. 422); she did not tell the

Detective that Ashlee was laughing in the ambulance on the way to the hospital or that Ashlee had asked if she would be on TV (H.Tr. 422).

Sally McHugh testified that she did not social with Steve Loomis (H.Tr. 402-403) and never threatened to remove Mrs. Vasquez Vasquez's children if she cooperated in Robert Vasquez's defense. (H.Tr. 402).

Cleveland Police Officer Timothy Zbikowski was in Steve Loomis's Academy class and who lived near the Shaffer's and also socialized with Steve's family in August, 2000. (H.Tr. 431-433). He testified that Steve called *him* to come over and talk to Ashlee at the Shaffer home on August 4, 2000 and he did so before police and EMS arrived (H.Tr. 434-435). Officer Zbikowski talked to Ashlee for a few minutes while Mrs. Vasquez was nearby" at the front door; Mrs. Vasquez said nothing, but brought Ashlee a blanket. (H.Tr. 434-437). Steve asked Ashlee no questions. (H.Tr. 438). As a result of his discussion with Ashlee, the Officer talked to Steve briefly and they called the police and EMS. (H.Tr. 439).

29. A portion of the trial transcript that is relevant here shows that Ashlee Loomis related her account of what occurred to her to a number of people: Don Shaffer ("She proceeded to tell me that 'Robert licked my vagina' " T.Tr. 206); Officer Vega at the scene ("He was licking her vagina area" T.Tr. 237), to MetroHealth medical staff, as shown from the medical records ("accused oral/genital intercourse" (T.Tr. 292, introd. as evidence), to Sally Weindorf, the CCDHS Social Worker ("He took her pants and panties off and licker her private

spot...[on] an anatomically correct drawing...She circled the vaginal area" T.Tr. 255), and finally in court at trial. ("And he licked your private spot?" "Yes." And indicated. T.Tr. 42; 46).

(E) Claim that Counsel Did Not Obtain a Speedy Trial Waiver

30. Attorney Butler testified that the night before the scheduled trial date, he again contacted Vasquez regarding a time waiver, explaining to him that Butler would have more time to prepare the case and with more time, perhaps his family, his wife, might "come around" (H.Tr. 124-125). Vasquez refused. (H.Tr. 125).

31. The defendant testified that he refused to sign a speedy trial waiver against Butler's advice and on the advice of a fellow inmate at the County Jail, and concluded that that information was more reliable than what his attorney was telling him. (H.Tr. 352; 363; 383). Vasquez testified that he didn't sign the speedy trial waiver because "I knew it was a good possibility that they would have to dismiss it after 90 days." (H.Tr. 352). So Vasquez was banking on the case running out of time and decided to take that chance, as opposed to listening to his attorney. The fact that his choice in retrospect may not have beneficial to him does not render counsel ineffective.

(F) Claim of Defense Counsel's Ineffectiveness at Trial

32. Defendant's petition for post-conviction relief addresses the following claims of counsel's ineffectiveness at trial:

> (a) Cross examination of State's witness Sally Weindorf at Tr. 264 where Social Worker Sally Weindorf explains whose homes she has investigated as a result of this complaint, and

> defense counsel asked "Who are all these people?";
>
> (b) Cross-examination of Sally Weindorf wherein defense counsel elicited alleged prejudicial hearsay testimony concerning a child abuse investigation of the Vasquez family in Nevada.

The defendant suggests that Butler's final question reveals that Butler did not know who "all these people" were. He concludes that if Butler did not know who these people were, he did not know enough about the case to have rendered effective assistance.

33. The claim of counsel's ineffectiveness for failing to object to hearsay testimony elicited from Sally Weindorf, which he claims was prejudicial, was raised in almost verbatim fashion as error on appeal and overruled. *Vasquez*, 2001 WL 1352781 at **4. It is, therefore, *res judicata*. *Perry, supra*. The Eighth District stated:

> [C]ounsel's eliciting evidence of Vasquez's drug abuse problem and prior child abuse allegations during the cross-examination of Weindorf, constituted harmless error. As the Court in *Strickland* held, even professionally unreasonable errors by defense counsel do not violate the Sixth Amendment right to counsel absent an actual effect on the outcome of the trial. *Strickland, supra* at 695. *** In the instant case, even without Weindorfs testimony, there was sufficient evidence of the rape and kidnapping as provided by the victim's explicit testimony of the assaulH.Tr. Therefore, these alleged

errors committed by counsel did not effect the outcome of the trial.

State v. Vasquez, supra, 2001 WL 1352781 at **4.

34. The transcript reveal that at trial, the following questions were asked of Sally Weindorf by Attorney Butler:

> Q: Now, when you went and investigated the Loomis' home, did you investigate anyone else's home?
>
> A: Yes, I did.
>
> Q: Whose home was that, ma'am?
>
> A: Um, Becky Kitchen's home and Don Shaffer's home, and, um, Christine Maicziak's home, and also Mrs. Karra Vasquez's home.
>
> Q: Who are all these people?

35. Throughout the trial transcript, both the State and the defense refer to the fact that the Vasquez family, including Mrs. Vasquez the defendant's wife, lived with Don Schaffer and his then-girlfriend, Rebecca. Butler was aware of Mrs. Vasquez's sister "Christy" since Butler cross-examined Steve Loomis on the fact that Loomis once dated Christy. (See T.Tr. 159).

(G) Claim that Counsel Advised Defendant Not to Testify at Trial

36. A claim concerning the fact that the defendant did not testify at trial was not raised in his post-conviction petition. Attorney Butler was never examined at the hearing as to whether he did or did not advise his client not to testify. At the hearing, defense counsel examined the defendant about the fact that he did not testify at trial, despite his claimed willingness. The defendant claimed that he

did not testify because Butler advised him that a '10-year-old misdemeanor conviction for trespassing' and his recent '5th degree misdemeanor conviction for 'substance introduced into the interstate commerce', could be used to discredit him in front of the jury. (H.Tr. 353-354). Vasquez testified that he heard Butler's testimony that he was aware of other sex abuse allegations made against the defendant (H.Tr. 377) and that it was Butler's advice that he not testify. (H.Tr. 379-380).

37. This Court noted (H.Tr. 379-380), the State was attempting to show that Butler's advice was reasonable and proper in light of his knowledge of both the Lakewood investigation and the California rape complaint, and based on "fear of a good prosecutor getting Mr. Vasquez a little worked up and blurting out something to the effect of never abused any child, in which case every door is open..." (H.Tr. 380). Vasquez testified that he does not now deem that advice to be competent, "[n]ow that [he] found out he didn't do his job." (H.Tr. 381).

(H) Claim that Defense Counsel's Closing Argument Constituted Only Five Pages of Transcript

38. This claim was not addressed at the hearing and was supported in the petition as demonstrating ineffectiveness because of the seriousness of the case.

Conclusions of Law

After an examination of the entire proceedings in CR 410438, the petition for post-conviction relief, and all of the files and records pertaining to the proceedings, the Court concludes that no substantial grounds for post-conviction relief exist and no hearing is warranted based on the following conclusions:

1. The Court concludes that defendant's instant petition was filed within 180 days of the filing of the trial transcript in the court of appeals in his direct appeal, and that it is, therefore, timely. R.C. 2953.2I(A).

2. The Court finds that neither the testimony from Donald Butler or any other witness, showed that Butler violated a professional" duty as guaranteed by the Sixth Amendment to the United States Constitution or by Article I, Section 10 of the Ohio Constitution. Butler's testimony not only showed no failure in his obligation to prepare the case for trial in general, but specifically concerning the subpoenaing of witnesses, his testimony and that of others showed that the defendant's family members refused to cooperate with the defense. Butler explained, and the witnesses themselves corroborated, that Mrs. Vasquez, Becky Schaffer and Mrs. Kitchen refused to cooperate in his defense. Butler's explanation concerning his efforts to contact these family members and their uncooperativeness was corroborated at the hearing by Detective Chappelle. Since Tammy Salopek was a friend of Becky's, had Becky been cooperative with Butler, he could have possible learned of her, and her daughter's availability as witnesses. Butler's decision not to subpoena these uncooperative witnesses was reasonable and based on solid professional judgment and experience. *Coulter; Fussell.* Finally, and perhaps most importantly, not one of the witnesses who testified - neither the defendant, his family or others - offered any testimony that could have changed the outcome of defendant's trial. *Strickland; Bradley.* Since the defendant did not meet his burden of proving this fact, Butler's failure to call them as witnesses does not demonstrate his ineffectiveness. *Strickland;*

Bradley. Counsel is not ineffective for trying to contact defense witnesses who refused to respond or otherwise help in the defense. He is not ineffective for failing to subpoena witnesses whom he considers to be uncooperative and who refused to talk to him prior to trial - or in failing to subpoena witnesses to whom family members could have led him. He is not ineffective for failing to subpoena uncooperative witnesses who, in his experience and professional judgment, would not be of assistance to the defense. *Strickland; Bradley.*

3. Butler's professional opinion that Becky Shaffer would not be of assistance to the defense since her husband was a State's witness, and because of Mrs. Kitchen's representations that no one in the family would help, is a decision that is solely within defense counsel's discretion as strategy he deems appropriate. *Fussell; Reese; Vasquez, supra.* Even if Butler had subpoenaed Mrs. Vasquez to testify, her testimony placed her husband in the basement with the victim for about a five minute period on the night the victim stated the defendant raped her. Had she testified at trial, she would have corroborated the victim's testimony. Further, there is no indication from the hearing that a jury would be more likely to believe Mrs. Vasquez over Ashlee Loomis, who gave a consistent account of the rape and kidnapping on five different occasions. Mrs. Vasquez does not offer any testimony that would in any way exonerate her husband, or even tend to show that he may not be guilty. Instead, it is most damaging since places him alone with the victim the evening of July 23rd, 2000, at the exact location and time that the victim testified that the rape occurred.

4. Nothing that the defendant stated at the hearing shows that his testimony could have had a

bearing on the outcome, other than his protestations of innocence. There is no indication that this would have any weight over the victim's testimony and the fact that she related the rape consistently to a number of people, including a trusted family friend, the police, a social worker, medical authorities, and in court. *Strickland; Bradley.* In light of this, Butler's advice that defendant should not testify if he gave it, was professionally responsible and wise.

5. Defendant attempted to show through trial counsel Donald Butler and the defendant that Butler somehow did not do enough or should have fulfilled his professional duties differently to provide defendant with a better defense. This is the type of "[g]eneral conclusory allegations" that, without a showing of prejudice, the Ohio Supreme Court considers inadequate to even impose a hearing. *Jackson; Apanovitch; Poland; Rivera v.* The defense asked questions of Butler regarding the time spent meeting with his client, on pre-trials, and in preparation for trial. The end result is that he showed no prejudice as a result of this allegation. *Id.*

6. According to Ashlee Loomis' direct examination trial testimony, the information in the EMS run sheet corroborates the victim's testimony that the defendant placed his tongue inside her. The Court concludes that here was no reason to cross-examine Ashlee on the information in the EMS run sheet since it was consistent with her trial testimony. As Attorney Butler concluded, it was a tactical decision, and one within his professional judgment to make. *Coulter; Fussell.* In addition, the trial transcript does not support Pavlish's conclusion that the EMS report and the transcript are inconsistent on this issue according to Steve Loomis's testimony regarding his and his daughter's activities

that evening. The fact that Steve Loomis testified that Ashlee was sleeping by the time the Loomis's got home does not preclude the possibility that Ashlee took a shower that evening. The information in the EMS run sheet concerning a shower also is irrelevant in light of the fact that sexual intercourse and/or ejaculation was never alleged, meaning that no DNA evidence ever was present.

7. Defendant's claim that defense counsel was ineffective in asking questions of Sally Weindorf that elicited alleged prejudicial hearsay testimony concerning a child abuse investigation of the Vasquez family in Nevada was raised on direct appeal. Consequently, this claim cannot be entertained by this Court. *Id.; Perry.* Even if it could, however, it does not demonstrate that defendant's conviction is void or voidable in light of the Eighth District's decision that counsel's performance relative to this same issue did not rise to the level of a constitutional violation under *Strickland. Id.*, R.C. 2953.21(A).

8. Defendant's claim that defense counsel was ineffective in asking questions of Sally Weindorf concerning the homes she investigated was not raised on direct appeal, but could have been and, therefore, is *res judicata. Perry.* This claim is not exempt from the *res judicata* bar as being supported by evidence de hors the record, since the supporting documentation the record. *Lawson.* Additionally, the questioning does not in any way demonstrate ineffectiveness under the requirements of *Strickland, Bradley.* While this is defendant's interpretation of why defense counsel asked the question, this Court must presume that defense counsel is competent and must defer to counsel's competency in scrutinizing his actions. *Smith; Sallie, supra.* Under that

presumption, it is reasonable to conclude that Butler asked the question of Weindorf to determine whether or not she knew who everyone was, or that he asked the question in order for her to explain the identities "of all these people" for the benefit of the jury. This Court is required to defer to one or more plausible explanations for the question. *Id.* Ineffectiveness cannot be shown, therefore, from this single question or this line of questioning that shows counsel's was competent. *Id.* Finally, even if the Court found that Butler's question demonstrated a deficiency in his duties, defendant has shown no resulting prejudice. As demonstrated above, neither the testimony of Mrs. Vasquez or Becky Schaffer would not have changed the outcome of the trial. *Strickland; adley.* Defendant has not identified in his petition what testimony Christine Maicziak could have provided that would have changed the outcome of this trial, which is his burden. *Id.* There was no testimony at the hearing relative to Christine Maicziak that showed counsel was ineffective for failing to subpoena her or that Maicziak's testimony would have changed the outcome. *Id.;* Finally, there was testimony from Sally McHugh and the that Christine Maicziak's children were interviewed at the Lakewood Police Department by Sally and a police officer, which demonstrates that Maicziak's testimony would not likely have changed the outcome. *Id.*

9. The claim that Attorney Butler's closing demonstrated ineffectiveness because it was only five pages long is *res judicata* for the purposes of this petition. *Perry, supra.*

Based on the foregoing findings and conclusions, this Court concludes that defendant has failed to establish sufficient grounds to believe that

there was such a denial or infringement of his Constitutional right to due process, a fair trial, or the effective assistance of counsel that requires this Court to render his conviction void or voidable. R.C. 2953.21(A)(I). The petition for post-conviction relief filed by defendant Robert Vasquez on October 9, 2001 must be and, therefore, is, denied.

Dated: 12/8/02 s/Judge Robert Glickman

Pursuant to Civ.R. 58(B), the Clerk of Courts is hereby ordered to send copies of the foregoing to the following parties and its date of entry upon the journal:

Mark Marein and Steven Bradley, 222 Leader Building, 526 Leader Building, 526 Superior Avenue, Cleveland, Ohio 44114.

Lisa R. Williamson, Assistant County Prosecutor, 1200 Ontario Street, 8th Floor, Cleveland, Ohio 44113.

No. 09-1328

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN SMITH, Warden,

PETITIONER,

-vs-

ROBERT S. VASQUEZ,

RESPONDENT.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

There are aspects of Petitioner's Statement of the Case and facts that are misleading as relates to the summarizing of the Sixth Circuit's opinion and the deference applied in reaching that opinion. These facts and omissions will be addressed specifically in this opposition to *certiorari*.

Respondent Robert Vasquez was indicted on August 16, 2000 and convicted in the Cuyahoga County Court of Common Pleas for (1) rape of a minor under the age of thirteen (Ohio Revised Code ("O.R.C.") § 2907.02); and (2) kidnapping with a specification of sexual motivation (O.R.C. § 2905.01). His trial began on October 30, 2000. At trial, Defense Counsel offered no witnesses in Mr. Vasquez's defense. The trial concluded on November 3, 2000 with jury verdicts of guilty as to both counts of the indictment. On December 22, 2000, Respondent was given concurrent sentences of life as to Count One and nine years as to Count Two.

On October 9, 2001, Respondent filed a Post-Conviction Petition to Vacate or Set Aside Judgment of Conviction pursuant to O.R.C. § 2953.21. Thereafter, Respondent and Petitioner filed several memorandums and supplemental memorandums.

On November 14, 2002, the day after the Ohio Court of Appeals ruled on his direct appeal, the trial court denied Respondent's motion for post-conviction relief filed on October 9, 2001. The Ohio Eighth District Court of Appeals affirmed the trial court on January 20, 2004. That decision was appealed to the Ohio Supreme

Court on March 4, 2004. The Ohio Supreme Court denied leave to appeal and dismissed the appeal on June 9, 2004.

Respondent filed a petition for writ of habeas corpus on June 29, 2005. That Petition was granted on October 3, 2007. Pet. App. C-66a. Relying on different grounds, the Sixth Circuit Court of Appeals upheld the District Court's decision on September 2, 2009. Pet. App. B-3a. A request for a rehearing was denied on January 28, 2010. Pet. App. A-1a. Petitioner filed a Petition for a Writ of *Certiorari* to this Court and it is to this Petition that Respondent timely opposes.

INTRODUCTION

1. Question Presented No. 1: Does a state court act "contrary to...clearly established Federal law" under 28 U.S.C. § 2254(d)(1) when it cites the appropriate standard of review for a specific issue in its opinion but later uses imprecise shorthand terms in referring to that standard?

Petitioner's first question presented does not offer a compelling reason for this Court to grant *certiorari*. As stated in the Court's rules, *certiorari* may be granted when a court of appeals issues a decision in conflict with the decision of another United States court of appeals on the same important matter or when a court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Rules of the Supreme Court of the United States, No. 10. While Petitioner attempts to frame the question as fitting in this narrow class of cases, the facts and the Sixth Circuit's ruling demonstrate that it is not that type of case. The Sixth Circuit did not find that an imprecise shorthand is unacceptable even though the proper standard was applied. Instead, the Sixth Circuit determined that the state courts actually applied the incorrect standard. No court of appeals, and certainly not this Court, has ever held that the standard for ineffective assistance of counsel is anything but that which is articulated in Strickland. The state courts did not apply that standard and no further review of the Sixth Circuit's decision is warranted.

2. Question Presented No. 2: Did the Sixth Circuit err in granting the habeas writ on Respondent's ineffective assistance of counsel claim notwithstanding the state courts' contrary determination?

Here, Petitioner falls even farther from the type of question this Court seeks to review. Petitioner's complaint is simply that the Sixth Circuit's decision was incorrect because it is contrary to the decision of the state courts. The position advanced by Petitioner would make a federal court subservient to an incorrect determination of federal law by a state court. After the proper deference afforded to the state courts by the AEDPA, the Sixth Circuit determined that Respondent received ineffective assistance of counsel and that he was entitled to a new trial. This decision was made by correctly applying both Supreme Court and Sixth Circuit precedence and no further review is warranted.

STATEMENT OF FACTS

The facts are taken from the District Court's Opinion. Pet. App C-74a-101a. This is done for two reasons. First, contrary to Petitioner's suggestion, the District Court did rely on facts contained in the state court proceedings and cited to those proceedings frequently. Secondarily, the District Court's review and synthesis of facts from all state court proceedings provides a comprehensive overview of the facts. Additionally, Respondent asserts that the District Court was correct in its finding that: "[a] comprehensive review of the 800-plus pages of transcript in the record, in addition to the rest of the documents contained in the record, provides clear and convincing evidence that the facts as found in the Direct Appeal Opinion and Postconviction Hearing Findings . . . are inaccurate in numerous places." Pet. App C-74a. The District Court acknowledged the deference due under the AEDPA but determined that the "clear and convincing" evidence relieved him of that obligation. Id. The District Court's thorough discussion of the testimony, complete with citations to the record, was accurate and permissible based on the factual errors of the state courts.

A. The Alleged Attack

On July 23, 2000, A.L. and her father, S.L., a police officer with the City of Cleveland Police Department, went to their friends', Don and Becky Shaffer, home after the day together to get something to eat. However, when they arrived, it was late and Shaffer and Becky had retired for the night. Pet. App C-74a. Vasquez, his

wife Karra, and their two daughters lived in the Shaffer's basement as of that day. Pet. App C-75a. After eating, A.L. went down the 10-12 stairs to the basement. Id. Karra Vasquez and S.L. sat just outside by the screen door at the top of the stairs that lead into the basement. Id. A.L. remained in the basement with Respondent Vasquez and his daughters for about five minutes. Id. After A.L. and her dad had been at the Shaffer's house for a short time, S.L. called to his daughter from the top of the stairs to go home. Id.

B. Reporting the Attack

On August 4, 2000 A.L. and S.L. were again at the Shaffer's condo. Id. While there, A.L. told Don Shaffer that Vasquez had sexually assaulted her by "licking her private spot." Id. at 76a. Don Shaffer, S.L.'s best friend, told S.L. who then called his partner, Officer Tim Zbikowski. Id. The two talked about the allegations with A.L. Id. They called 911 and police and emergency personnel arrived. Id. A.L., S.L., Becky Shaffer and her infant son Aaron were taken to the hospital. No DNA evidence was found during the examination or during the subsequent investigation.

C. The Prosecution and Trial

1. Pre-Trial

Respondent Vasquez remained in custody from the time he was arrested. Id. at 77a. After his first appointed attorney withdrew due to a conflict, Vasquez's final trial counsel was appointed. He appeared at the first scheduled pretrial, on September 21, 2000, at which time he requested a continuance. Id. The court

continued the matter until October 12, 2000, for another pretrial. An additional pretrial was held on October 19, 2000. Trial counsel met with Respondent Vasquez on the last two pretrials for approximately 30 minutes total and again on the night before trial[1]. The case was tried on October 30, 2000. Id.

2. Trial

The case relied entirely on A.L.'s testimony about the attack and her father's testimony about her behavior. Other witnesses, including Don Shaffer, testified about what A.L. told them or what they learned while investigating the case. There was no D.N.A. or other physical evidence presented. Id. at 77-78a.

Trial counsel's cross-examination of A.L. "was limited in scope and duration, and arguably even more damaging than helpful to Vasquez's defense; at one point [he] asked [A.L.] if she kept a diary, to which [she] replied that she did. [A.L.] had not mentioned the diary in her direct examination, and the prosecutor had not offered it as an exhibit. [He] then asked whether [A.L.] had written about the alleged incident in her diary, to which [A.L.] again answered in the affirmative. He pressed on to ask whether [A.L.] had brought the diary to court that day, and A.L. answered no. [He] then concluded his questioning about [A.L.'s] diary by asking if she still had it, to which [A.L.] answered yes. [He] asked no other questions about

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[1] Trial counsel admitted that he took no notes of any of his meetings nor did he have two 10-page letters Respondent wrote to him. Pet. App. C-82a. He attempted to justify his failure to take notes or preserve copies of the letters by claiming that he had a good memory. ("So it is your practice that you don't take notes of your interviews with the client? No. I don't have to. Right. Because you have a pretty good memory? Right... I don't take notes. I just listen.") Post-Conviction Hearing Tr., pp.93-94, 103. This was disingenuous as his testimony, and loss of memory, in the Post-Conviction Hearing clearly demonstrates. Post-Conviction Hearing Tr., pp. 55, 90-91, 126, 128-130, 135-136, 348, 353; Original Trial Docket.

the diary, nor did he ever demand to see the diary after learning of its existence." Id. at 78a.

Trial counsel did not call a single witness. The case against Respondent was the then "ten-year-old victim, no physical evidence, a substantial delay in reporting the alleged incident, combined with the improbable circumstances of Vasquez assaulting [A.L.] while other adults (including a Cleveland Police Department officer and Vasquez's wife) were upstairs in a tiny home and two other young children were in the same room." Id. at 79a. Respondent was convicted and sentenced to life in prison.

D. Post-Conviction Hearing

On May 14-17, 2002, a post-conviction hearing was held.

1. Post-Conviction Hearing Testimony

[Trial counsel] testified that he was "pretty sure" he talked with Vasquez in a holding cell following a pretrial on September 14, 2000, though there was no pretrial that day according to the docket. He had no notes to verify this. He claimed he met with Respondent three times after two pretrials and on the night before trial. According to him, the first two meetings were a total of 30 minutes long. He also testified that his pretrial preparations included legal research on child rape cases, filing standard discovery requests, and having an informal meeting with the initial prosecutor. He also testified that he asked Respondent to sign a

speedy trial waiver twice. Respondent declined to sign it and [trial counsel] testified he was prepared to go to trial. Id. at 79-80a.

He also claimed that there were no helpful witnesses. He spoke to Joanne Kitchen[2], Respondent's mother-in-law, at Respondent's behest. Respondent gave him her name and phone number. Respondent told him that she could help him contact his wife. [Trial counsel] claimed that Kitchen told him no one would help. There were no notes to corroborate this conversation. Id. at 81a. After that, he made no attempt to talk with Respondent's wife Karra Vasquez. He also claimed that he assumed that Becky Shaffer would not be a helpful witness. Id. at 82a.

2. Karra Vasquez's Post-Conviction Hearing Testimony

Karra Vasquez emphatically detailed numerous attempts to contact her husband's first counsel as well as trial counsel. Those calls were never returned. She testified that she did not attend the trial or sentencing because she felt threatened by the social worker because she had been threatened with the removal of her children if she helped him. Id. at 83a.

Karra testified that she observed A.L. wearing a bathing suit on the night of the alleged attack. This contradicts A.L.'s testimony that Vasquez "pulled down my

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[2] The record is unclear exactly how and when trial counsel received Kitchen's name and phone number. Vasquez did not explicitly state in his post-conviction hearing testimony how or when he conveyed the information, although he testified that he gave his lawyer two ten-page handwritten letters containing information for trial counsel to investigate further. Trial counsel similarly testified that Respondent provided him with the information, but it is unclear whether the information was conveyed via the letters or orally. To further complicate matters, trial counsel testified that he received the information "when I think I went up in the jail," (Id. at 81a, n. 18) but the uncontested facts are that he only visited Vasquez at "the jail" on the night before trial, October 29, 2000.

pants and underwear" and that she "pulled my underwear and pants back up." S.L. testified at trial that A.L. told him that Vasquez "took her pants -- her shorts and her panties off" and that A.L. "pulled her clothes on." Second, Karra testified that A.L. went to the basement two times. The first time was for just a few minutes and, during the second time, Karra could hear them changing her daughter's diaper and getting the kids ready for bed. Then, A.L. left when her father called her. Id. at 83-85a.

Karra testified that her husband was in the basement with her children when A.L. and her father arrived and the Shaffers were in bed. A.L. had alternately testified that "just Don [Shaffer]" was awake when she and her father arrived at the condo, that she saw Respondent when she arrived because he was on the couch watching T.V. with his wife and that he asked her to go down to the basement with him. Id. at 86-87a.

Karra Vasquez also testified that she heard S.L. coaching A.L. and asking her specific questions while she was recounting the alleged attack, such as when and how the incident happened, and how long did it take. A.L. initially responded that the incident took two hours. S.L. replied that was too long and "you have to get this right. You have to make sure that you know exactly what you are going to say and repeat this to every person that asks you. You can't change your mind." Karra also heard A.L. asking "does this mean I get to be on TV? If I tell them this do I get to be on TV" and laughing and giggling. Id. at 88a.

3. Becky Shaffer's Post-Conviction Hearing Testimony

Becky Shaffer testified that she received a subpoena from the prosecution to testify at trial, that she was in the courthouse all three days of the trial, and that the prosecutor told her to leave the courthouse because they did not want Respondent's counsel to see her. Id. at 89a.

She testified that during the ride to the hospital, A.L. appeared excited by the attention she was receiving and asked if she was going to be on TV." Becky Shaffer also testified that on the night of July 23, 2000, she and her husband were in bed when A.L. and her father arrived. Becky Shaffer also testified that she took her son to the hospital with A.L. and her father because A.L.'s father and his partner told her to, not because she was concerned about Respondent. Finally, she verified that the social worker threatened to take Karra's children if she continued to try to help her husband. Id. at 89-92a.

4. Joanne Kitchen's Post-Conviction Hearing Testimony

Joanne Kitchen testified that she only told trial counsel that *she* could not help because she was not there. She denied saying that no one would help Respondent. But Ms. Kitchen was present when Karra was threatened by the social worker and Ms. Kitchen testified about her personal observations of A.L.'s attention seeking behavior. Id. at 92-95a.

5. Tammy Salopek and her daughter's Post-Conviction Hearing Testimony

Tammy Salopek also testified at the post-conviction hearing. Salopek was friends with the Shaffers and A.L. and her father. Salopek testified that A.L. and her sister would spend the night frequently. She did not know Respondent at all. Importantly, Salopek testified that her children were sexually molested and her daughter testified that she told A.L. about the details of the incident. Both Ms. Salopek and her daughter testified that A.L. is constantly seeking attention, is a "drama queen," and would overexaggerate. They both also testified that A.L. lied. Salopek stated: I wouldn't take anything that A.L. would come and tell me on A.L.'s word. Id. at 95-99a.

Salopek also testified about A.L.'s behavior in the days following her report of the alleged sexual abuse. Although she testified that A.L. stayed with her for four days after reporting, Salopek stated that A.L. had no trouble sleeping or eating and acted completely normally. This contradicts A.L.'s father's testimony at trial that his daughter was emotional and upset after telling him what happened. Id. at 97-98a.

6. Vasquez's Post-Conviction Hearing Testimony

Respondent testified that he only met with his trial counsel on three occasions for a total of 45 minutes. His testimony about the incident was that he was in the basement when A.L. arrived, that she came downstairs for 5 minutes and then left. Id. at 100-101a.

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents in Determining That the State Courts' Rulings Were Contrary to Federal Law.

Petitioner argues that the Sixth Circuit failed to apply the proper Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") deference to the state court opinions. Alleging the Sixth Circuit ignored this Court's holding in Woodford v. Visciotti, 537 U.S. 19 (2002) and Holland v. Jackson, 542 U.S. 649 (2004), Petitioner asks whether referencing the Strickland standard for ineffective assistance of counsel using "imprecise shorthand" results in a decision that is "contrary to" federal law. This demonstrates a clear misstatement and misunderstanding of the legal underpinnings of the Sixth Circuit's opinion in the instant case. It was not the misstatement of the legal standard that led to *de novo* review. It was the clear *application* of the incorrect standard that guided the Sixth Circuit's conclusion that the state court opinions were contrary to federal law.

The Sixth Circuit's opinion, written by Circuit Judge Boggs, held that the state courts increased the burden of persuasion necessary to sustain an ineffective assistance of counsel claim pursuant to Strickland. Pet. App B-4a. The Court correctly noted that Strickland requires a petitioner to demonstrate that there is a "reasonable probability" of a different outcome but for the inadequacy of his counsel. Id. at 10 (citing Strickland, 466 U.S. at 694). The majority noted, however, that the Ohio trial court and the Ohio appellate court elevated this already difficult burden

by applying the standard of whether the trial outcome "*would* have been different" but for the mistakes of counsel. Id. at 15a.

Deference is not required when the state court decision is "contrary to" federal law.

> The maxim that federal courts should 'give great weight to the considered conclusions of a coequal state judiciary' . . . does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.
> Wright v. West, 505 U.S. 277, 305 (1992) (opinion concurring in judgment). See also, Panetti v. Quarterman, 551 U.S. 930, 954 (2007) (When a state court's adjudication of a claim is "dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires."); Early v. Packer, 537 U.S. 3, 8 (2002) (indicating that § 2254 does not preclude relief if either "the reasoning [or] the result of the state-court decision contradicts [our cases]").

The Sixth Circuit did not simply find a fleeting shorthand reference to an incorrect standard. Instead, the Sixth Circuit explicitly noted that "[t]his was not a slip of the pen during a rote repetition of a rule corrected upon application of law to fact." Pet. App B-15a. The Court found that, although the trial court correctly cited Strickland, when discussing its second prong, the trial court (and subsequently the appellate court) "stated that prejudice occurs only when '[the result of petitioner's trial or legal proceeding *would have been different* had defense counsel provided proper representation.'" Id. (emphasis in original). The Sixth Circuit went on to note that the trial court repeated itself, "explaining that '[i]n order to demonstrate a

claim of trial counsel's ineffectiveness according to the United States Supreme Court, a postconviction petitioner is required to demonstrate that (1) the performance of defense counsel was seriously flawed . . . and (2) the result of petitioner's trial or legal proceeding *would have been different* had defense counsel provided proper representation.'" Id. at 15a (emphasis added). The state court again and again relied on its incorrect version of the second prong of the ineffectiveness standard: "'perhaps most importantly, not one of the witnesses who testified [at the post conviction hearing] . . . offered any testimony that could have changed the outcome of defendant's trial'"... "'even if the Court found that Butler's question demonstrated a deficiency . . . defendant has shown no resulting prejudice. As demonstrated above, neither the testimony of Mrs. Vasquez or Becky Shaffer would not [*sic*] have changed the outcome of the trial.'" Id. It was upon the state court's application, not a simple misstatement, of the incorrect standard that the Sixth Circuit determined that the state court decision was contrary to well established Supreme Court precedence.

Circuit Judge Boggs painstakingly explains that it is the *changing of*, not merely the shorthand reference to, the standard that is the basis of the Court's opinion that both state courts applied the wrong standard:

> In analyzing Vasquez's claim as to the failure to interview and call potential defense witnesses, the court relied directly on its version of the ineffectiveness standard as crucial to its decision against relief: "perhaps most importantly, not one of the witnesses who testified [at the post conviction hearing] . . . offered any testimony that could have changed the outcome of defendant's trial." The court repeated, in the context of a different claim of ineffectiveness, that "even if the Court found that Butler's question demonstrated a deficiency . . . defendant

> has shown no resulting prejudice. As demonstrated above, neither the testimony of Mrs. Vasquez or Becky Shaffer would not [*sic*] have changed the outcome of the trial."
> The Ohio Court of Appeals, reviewing for abuse of discretion, repeated the error. It framed its rejection of Vasquez's appeal in terms of a changed-outcome: "defendant presented numerous witnesses who did not testify at his trial. Their absence . . . does not demonstrate his counsel was ineffective and that the outcome of his trial *would have been different* had they been witnesses . . . ." (emphasis added). In analyzing the argument, the appeals court expressly adopted the trial court's reasoning: "[w]e agree with the trial court's conclusion that 'not one of the witnesses who testified . . . offered any testimony that could have changed the outcome of defendant's trial.'"
> This is not a casual error.
> Pet. App B-15-17a.

It is only through the twisting of the opinion below that Petitioner can claim that the question before this Court is whether a federal court should uphold a state court decision when it initially cites the correct standard and later uses "shorthand in referring to it, even if the shorthand is imprecise." Petition at 11. This statement completely trivializes and virtually ignores the foundation of the Sixth Circuit's opinion. In fact, the Sixth Circuit specifically noted that when a situation exists as Petitioner claims is here, this Court has found the state court decision not contrary to clearly established federal law. Pet. App B-18a. The Sixth Circuit's opinion expressly cited Holland v. Jackson, 542 U.S. 649, 654-55 (2004) for its holding that the "use of the unadorned word 'probably' is permissible shorthand when the complete Strickland standard is elsewhere recited." It also cited Woodford v. Visciotti, 537 U.S. 19, 23 (2002) for the proposition that an innocuous shorthand is permissibility when describing the Strickland standard. Pet. App B-18-19a.

Petitioner primarily rests its request for *certiorari* on the assertion that this case is remarkably similar to Jackson and Visciotti. While Petitioner correctly states that the cases stand for the proposition that using an ephemeral shorthand reference to Strickland is permissible, that holding is inapplicable here and those cases are unmistakably distinguishable from the instant one. The Sixth Circuit's opinion plainly distinguished itself from the "shorthand" cases of Jackson and Visciotti and properly placed itself under the controlling Supreme Court precedent of Williams v. Taylor, 529 U.S. 362 (2001), to find that both the Ohio trial court and the Ohio appellate court applied a standard contrary to clearly established federal law. Pet. App B-19a.

In Jackson, this Court reversed the Sixth Circuit's holding that the state court applied the wrong burden of proof under Strickland. Jackson, 542 U.S. at 655. These three statements the Sixth Circuit found objectionable were: (1) in a post-conviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence; (2) it is asking too much that we draw the inference that the jury would not have believed Hughes at all had Melissa Gooch testified; and (3) Petitioner failed to carry his burden of proving that the outcome of the trial would probably have been different but for those errors. Id. at 654-655. The first statement was "reasonably read as addressing the general burden of proof in postconviction proceedings with regard to factual contentions..." Id. at 654. The second statement was not seen as implying "any particular standard of probability."

Id. Finally, use of the "unadorned word 'probably' is permissible shorthand when the complete Strickland standard is elsewhere recited." Id. at 655.

In both Jackson and Visciotti, the Supreme Court examined opinions where the state court first articulated the correct Strickland standard, but proceeded to leave out the "reasonable" modifier in subsequent references to the standard. In Visciotti, the Ninth District Court of Appeals held that the state court used a higher standard of proof because the state court opinion used the term "probable" without the modifier "reasonably" in four places. Visciotti, 537 U.S. at 23. As noted above, the use of the "unadorned word" probably is permissible shorthand. Id. at 24. In Visciotti, the Court discusses the Strickland test's terms and the use of shorthand:

> [The state court's] occasional shorthand reference to that standard by use of the term "*probable*" without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision.

537 U.S. at 23-24 (emphasis added).

Yet, in the case at bar, the state courts did not just exclude a simple modifier. The state courts used no modifier whatsoever. The vital term of "probability" was stricken from its Strickland analysis, making it clear that an impermissibly higher standard was applied. The standard was clearly changed to an absolute. It is apparent that this Court finds the term "probable" (or some analogous variant thereof) to be absolutely essential to the Strickland standard. The lack of the "reasonable" modifier is considered "imprecise" but acceptable because it does not connote a different standard. However, the language in the Ohio state courts in

Respondent's post-conviction adjudication indicates that a different standard was applied.

The removal of the term "probability" from the Strickland test, leaving "would have been different," changes the test's burden of proof entirely. Under the Strickland standard, "reasonable probability" is a burden less than "more likely than not." Strickland, 466 U.S. at 693. In other words, the Supreme Court made it clear that conduct that has fifty percent or less chance of affecting the outcome of a trial may still satisfy the "reasonable probability" burden of Strickland. In stark contrast, herein, the state trial and appellate courts' application of the "would have been different" standard applies a burden of positive certainty - "that competent counsel actually would have resulted in [Petitioner's] acquittal;" a much higher burden than, and entirely contrary to, the standard set forth in Strickland. Pet. App B-17a.

Further, Petitioner analogizes to the present case this Court's conclusion that the shorthand was occasional in Jackson. Here, it was not occasional. In fact, this case represents nearly the opposite of Jackson and Visciotti. The only thing occasional or fleeting in Respondent's state court adjudication was the correct standard. As noted by the Sixth Circuit, there was only one correct cite and many erroneous ones. The erroneous references to the Strickland standard here were used when the courts were applying the analysis, not when introducing or setting the stage for the analysis.

Petitioner also discusses several circuit court cases in what seems to be an attempt to create a split in the circuits, although it also cites one in the Sixth Circuit. According to Petitioner, these cases show "little difficulty following Visciotti and Jackson." Petition at 14-15. Petitioner is correct that Visciotti and Jackson govern the cases it discusses. Respondent's case, however, is not such a case. This case involves an *application* of an incorrect standard and its holding is guided by this Court's decision in Williams, 529 U.S. 362. There, as here, the standard was not merely referenced improperly. It was applied that way.

The Sixth Circuit meticulously explained that the standard invoked in the state court was not merely a shortened, if imprecise, reference. It was not departing from any precedents, as suggested by Petitioner. Petition at 15. "This is not a casual error. A 'reasonable probability' of difference does not mean 'would have been different.' The latter formulation puts a greater burden on the petitioner. To prevail on his claim as it was adjudicated, Vasquez was required not only to show that his counsel's deficiency 'undermine[d] confidence in the outcome,' but to prove that a trial with competent counsel actually would have resulted in his acquittal." Pet. App B-17a.

In fact, as noted by the Sixth Circuit, this Court used an example strikingly similar to the instant case when interpreting what Congress meant by "contrary to" in § 2254(d). Id. at 111.

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding *would* have been different, that decision would be "diametrically

> different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different."

Williams, 529 U.S. at 405-06 (2001) (citing Strickland, 466 U.S. at 694).

That is why this case is far more similar to Williams than Visciotti or Jackson. In Williams, this Court reversed the Fourth Circuit Court of Appeals because it *applied* the wrong standard. "[The Court of Appeals] construed §2254(d)(1) as prohibiting the grant of habeas corpus relief unless the state court 'decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.'" Williams, 529 U.S. at 374. As in Williams, the state courts here changed the analysis; they changed the standard.

Only once does Petitioner attempt to scrutinize what the state courts did. "In assessing the prejudice, the court observed that 'none of the defendant's witnesses offered any testimony to support defendant's theory of innocence,' and '[n]one of their testimony challenges the victim's account of the events leading to defendant's convictions.'" Petition at 16. This statement, according to Petitioner, demonstrates that the state court used the correct standard. In point of fact, the only thing these statements demonstrate are a complete disregard for the realities of this and most child abuse cases. As correctly noted by the Sixth Circuit, there would be no direct witnesses to the alleged crime beyond the perpetrator and the victim. Pet. App B-25a. Therefore, there would be no witness to testify to innocence or to contradict

the alleged victim's account of the events. "The circumstances ordinarily surrounding an accusation of child sexual abuse underscore this concern for developing impeachment evidence." Id.

Contrary to the suggestion of Petitioner, the Sixth Circuit approached §2254(d) precisely as directed by this Court in Williams. The Court of Appeals first asked if the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 USC § 2254(d). Consistent with Williams, it found that the state court decision was contrary to clearly established Supreme Court precedent, Strickland. "[T]herefore the Court of Appeals was "unconstrained by *§ 2254(d)(1)* . . . and de novo review [was] appropriate." Pet. App B-19a.

Petitioner concludes its arguments regarding this Question Presented by claiming that the Sixth Circuit only held that the state courts' opinions were "contrary to" federal law on the second prong of Strickland. Petition at 16-17. Again, Petitioner mischaracterizes the Sixth Circuit's opinion. The Sixth Circuit did determine that *de novo* review was proper because of the failure to adhere to Strickland in the second prong of its test for ineffective assistance of counsel. However, when looking at trial counsel's performance, the Sixth Circuit clearly determined that it fell below any constitutionally permissive standard. The Sixth Circuit did so with considerable deference to the state courts' findings. In fact, the Sixth Circuit refused to consider both Petitioner's ex-wife's and ex-mother-in-law's

testimony because the findings by the state court relative to Mrs. Vasquez and Mrs. Kitchen were entitled to deference under the AEDPA. The Sixth Circuit employed the proper AEDPA deference and found trial counsel's performance impermissibly deficient. Pet. App B-32a.

If this Court were to accept Petitioner's contention, it would follow that as long as there is a recitation to a correct standard, it does not matter what the state court actually does or how it applies the standard. This will easily and quickly transfer from an ineffective assistance of counsel analysis to other areas of the law. It would not be an unreasonable stretch to say that as long as a state court correctly stated that the prosecution had the burden of proving guilt beyond a reasonable doubt, federal courts could not interfere if the state court then went on to actually apply a preponderance of the evidence standard in assessing the sufficiency or weight of the evidence. Such a result would leave the federal court in the secondary role of merely looking for the recitation of certain words and leaving any analysis of federal law to the state courts.

This flawed interpretation of federal law appears to be exactly what Petitioner is urging. "[H]aving shown that it was aware of the correct law, the court did not need continually to incant magic words to receive deference." Petition at 16. Petitioner's proposal that a state court opinion is entitled to deference regardless of the analysis as long as it initially correctly recites the legal principle on a single occasion is clearly contrary to federal law. As this Court noted in Williams, Congress did not intend that "federal courts actually defer to a state-court

application of the federal law that is, in the independent judgment of the federal court, in error." Williams, 529 U.S at 387.

B. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents in Determining That Respondent Received Ineffective Assistance of Counsel.

Petitioner next asserts that the Sixth Circuit's conclusion that Respondent received ineffective assistance of counsel was mistaken based on the specific facts of this case. Petition at 18. However, this Question Presented does not comport with this Court's rules guiding what types of cases are traditionally subjection to acceptance. Rule 10 of the Rules of this Court establishes that *certiorari* jurisdiction is designed to serve broad purposes. It is not for correcting the error in particular cases. Rule 10 explains:

> Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
> A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioner's second Question Presented seems to fall into just the type of category that this Court seeks to avoid when granting *certiorari*.

Again protesting the refusal to give AEDPA deference (the "decision to grant Vasquez habeas relief hinged entirely on its ability to wriggle free of the constraints of the AEDPA" (Petition at 18)), Petitioner asserts that Respondent Vasquez's trial counsel met the constitutional requirements of effective assistance of counsel. However, as correctly determined by both the District Court[3] and the Court of Appeals, trial counsel fell far below the constitutionally sufficient bar and provided ineffective assistance of counsel as he did no preparation or investigation before Respondent's trial on charges that could, and did, result in a life sentence.

First, as noted by the Sixth Circuit, it is essential that this inquiry is undertaken with an understanding of the type of case at issue here. Respondent was accused of the sexual abuse of a minor. It is undisputed that there are no witnesses to the alleged abuse. Pet. App B-25a. This is frequently the fact in these type of cases. Outside of the defendant testifying, there can be no direct evidence of innocence, only circumstantial. Here, as in other cases involving sexual abuse of a minor, the evidence that trial counsel failed to uncover and present at trial relates to impeachment of the complaining witness and those offering circumstantial evidence of Respondent's guilt. That the missing evidence alleged is impeachment evidence and not direct evidence of innocence does not affect the principles of Strickland or the basic components of effective assistance of counsel. As observed

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[3] The Sixth Circuit disagreed with the District Court's rationale for engaging in *de novo* review.

by the Sixth Circuit, "this is because we are assessing the reasonableness of the representation and the defenses available to the attorney change what is reasonable: where there are no direct witnesses to the alleged crime beyond the perpetrator and the victim, impeachment evidence is at a premium." Pet. App B-25a.

In some respects, Petitioner continues to argue the first question presented because it claims that the state court determination of facts should be given more deference. However, if this Court finds that the Court of Appeals correctly determined that the state court acted contrary to Federal law, the District Court and the Court of Appeals were free to review the facts de novo. The Federal Courts' determination that Respondent received ineffective assistance of counsel is more than supported by the evidence.

Moreover, the Sixth Circuit specifically rejected the District Court's wholesale review of the factual determinations of the state courts. As correctly stated by the Sixth Circuit, the "AEDPA also supplies our standard for reviewing a factual record. The statute provides that 'a determination of a factual issue made by a State court shall be presumed to be correct.' *28 U.S.C. § 2254(e)(1).* Only if Vasquez 'rebut[s] the presumption of correctness by clear and convincing evidence' may we disregard those determinations. The district court held that this burden was carried." Pet. App B-19a. The District Court stated: "Nevertheless, the Court finds that Vasquez has met his burden. Sadly, in this case his appointed counsel did

almost nothing before or during trial, in a situation where the prosecution's case was weak and Vasquez faced life imprisonment." Pet. App C-106a.

The Court of Appeals rejected the District Court's thorough and detailed *de novo* review of the facts as incorrectly determining that it was able to avoid the AEDPA deference to findings of fact. Pet. App B-21a. The Sixth Circuit specifically rejected the District Court's refusal to defer to the state court's findings that Joanne Kitchen and Mrs. Vasquez would have been helpful witnesses and that trial counsel's failure to contact Mrs. Vasquez was inexcusable. Id. at B-23a. Instead, the two part test of Strickland was undertaken with just the trial counsel's failure to contact other witnesses and failure to recognize and use the EMS run sheet as the vital evidence that it is.[4] Id.

Petitioner correctly notes that it is the testimony of three potential witnesses and the EMS run sheet that ultimately establish that the Strickland standard was met. However, the inquiry of the Strickland test is broader than that.

> A counsel's performance is a deprivation of a defendant's *Sixth Amendment* right to counsel where a defendant shows his counsel's assistance was both deficient and that the deficiency prejudiced the defendant. A performance is deficient only if it 'fell below an objective standard of reasonableness' in light of the 'prevailing professional norms.' And a deficient performance is prejudicial if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

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[4] "To reiterate, on the facts as we must take them, based on the implications of the state court's decision and the operation of AEDPA deference, Vasquez cannot base his ineffective assistance of counsel argument on the failure to investigate Karra Vasquez or Joanne Kitchen. They refused to cooperate and any amount of investigation by Butler would not have made a difference. But Vasquez may base his claim on the failure to investigate and put in the record the EMS run sheet and Becky Shaffer's account of A.L.'s credibility. By extension, Vasquez may also rely on the testimony of Salopek and Snyder, who (by admission of the trial court) likely would have been found through an interview with Shaffer, in making his claim." Pet. App B-23a.

> probability is a probability sufficient to undermine confidence in the outcome.
> Strickland, 466 U.S. at 687-88, 694 (internal cites omitted.)

Approaching the first prong of the test, the appropriate question is whether trial counsel's assistance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Instead of ignoring the "healthy amount of deference to counsel's tactical and litigation decisions," as suggested by Petitioner, the Sixth Circuit detailed the deference to be given. "... counsel's tactical and litigation decisions...are 'virtually unchallengeable' in the ordinary case." Pet. App B-24a. (quoting Strickland, 466 at 690). The most important aspect of this inquiry, that Petitioner has over looked, is precisely the one at issue here. As maintained by the Sixth Circuit:

> But this deference to strategic choices has always been tempered by a requirement that the choices themselves be informed: 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' Accordingly, 'a particular decision not to investigate must be directly assessed for reasonableness.' Our circuit has expressed this principle with more color: 'the investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the 'strategic' choice erected upon it rest on a rotten foundation.'
> Pet. App. B-24a (quoting Strickland, 466 U.S. at 691 and Ramonez v. Berghuis, 490 F.3d 482, 488 (6th Cir. 2007).

It was this area of inquiry that reasonably led the Sixth Circuit to conclude that trial counsel was constitutionally ineffective.

Focusing on trial counsel's duty to investigate and prepare for the case, the Sixth Circuit pointed out that there is not a definitive statement of what a "reasonable investigation" entails. Pet. App B-24-25a. "But well established

principles suggest that the claim that his attorney failed to identify key evidence and failed to locate and interview critical witnesses is within the known contours of the duty." Id. at 24a. Again, the fact that the key pieces of evidence and critical witnesses[5] would not go to the heart of the innocence question but instead to challenge the victim's credibility does not change the present analysis considering the type of case for which Respondent has been convicted.

The question becomes: were trial counsel's efforts at investigating and preparing for Respondent's trial reasonable? The Sixth Circuit and the District Court unequivocally answer the question in the negative:

> Indeed, viewing the situation (as we must) "from counsel's perspective at the time," *Strickland, 466 U.S. at 689*, four facts were clear and should have pointed him toward the investigation necessary to put on a stronger defense. First, A.L.'s story was never crystal clear, suggesting that perhaps a well-informed cross-examination and a contradicting defense witness could have raised a reasonable doubt as to its veracity. Second, all of the people involved in the crime and its revelation were extremely interrelated, suggesting that there is a convoluted back-story that could have provided context for the jurors to understand the accusation and resolve testimonial inconsistencies. Third, Becky Shaffer was the sister-in-law of Vasquez, at the place of the attack on the night it occurred, and with A.L. immediately her accusation, all suggesting that she may have had information useful to

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[5] Petitioner and the state courts lay the blame for the failure to contact witnesses squarely at Respondent's feet. However, the Sixth Circuit appropriately found that the cases do not support "the proposition that a defendant gets only the defense that he is capable of providing personally. (They hold only that it is not unreasonable for an attorney to limit investigation once her client has frustrated her otherwise reasonable efforts. *See, e.g., Lorraine v. Coyle, 291 F.3d 416, 435 (6th Cir. 2002)).* The *Sixth Amendment* guarantees minimally effective representation because the adversarial testing of the state's case, a cornerstone of our criminal justice system, is very difficult without counsel. *See Kimmelman v. Morrison, 477 U.S. 365, 384, (1986)* ('In making the competency determination, the court should keep in mind that counsel's function . . . is to make the adversarial testing process work . . . .') (internal quotation marks omitted). An attorney (especially an experienced one like [trial cousel] has skills and knowledge beyond the ken of an average criminal defendant. He should be expected to take a sober account of the case he is presented with and proceed to put together the best challenge to the prosecution's proof. This is true even if he must use information gleaned from discovery and investigation instead of the defendant's mouth." Pet. App B-26a, n. 2.

> the first two facts. Fourth, he had discovery materials from the state that, among other things, contained the EMS report and the names and contact information of the people the police investigated, including Becky Shaffer.
> Pet. App B-27a.

Against this backdrop, the Sixth Circuit determined that the failure to investigate, not the failure to utilize or call anyone as witnesses, was unreasonable. Id. The Court also went on to explain that the "prosecution's case affects our judgment regarding an attorney's decisions against investigation." Id. (citing Brown v. Smith, 551 F.3d 424 (6th Cir. 2008).) In the instant case, trial counsel knew that "Becky Shaffer was ideally situated to provide information on the only avenue of defense available to Vasquez and that the EMS report contained information contradicting the version of events that the state was alleging at trial. He was therefore deficient by declining to pursue these leads." Id. at 28a. It was purely unreasonable "to interview no potential witnesses and develop no defense." Id.

The Sixth Circuit then individually reviewed each witness and piece of evidence that it found relevant and carefully explained why the Ohio courts were incorrect. First, unlike Petitioner and the state courts, the Sixth Circuit wisely found that Mrs. Kitchen's alleged statement to trial counsel, which she denies making, that family members were unwilling to help should not have discouraged trial counsel from contacting Mrs. Becky Shaffer. "[I]t is incredible for [trial counsel] to base a decision against interviewing her on a single statement from the witness's mother." Pet. App B-29a. This is especially true since it was not necessary to go through her mother to contact her as it was with Respondent's ex-wife. Id.

The Court went on to state that the fact that Mrs. Shaffer was married to a state's witness may explain a reason to not call her to the stand, "but not why he did *not attempt to talk with her* in the first instance. *Cf. Brown, 551 F.3d at 432* ("[O]ur quarrel is not with trial counsels' decision to forgo calling . . . a witness *per se,* but rather with the lack of any reasonable, timely investigation into what she might have offered the defense.")." Id. Moreover, trial counsel knew that she "was likely to have relevant information and talking with her could help develop an otherwise non-existent defense." Id. Unlike the mischaracterization that all family members refused to cooperate, trial counsel did not reach this conclusion after any reasonable investigation. Undisputedly, he had one conversation with Mrs. Kitchen during which she allegedly stated that family may not want to cooperate. Trial counsel made no attempt to contact anyone else or determine if that statement was based in truth. Just as a non-cooperative defendant does not extinguish counsel's obligation to investigate, neither does a single uncooperative witness.

Another devastating failure on the part of trial counsel, as determined by the Sixth Circuit, is the inexplicable disregard for the EMS run sheet. This, the Sixth Circuit claims, should have been even more obvious than the necessary investigation that trial counsel failed to conduct. Pet. App B-29-31a. The EMS report contained information demonstrating inconsistencies in the victim's story: "she described the attack then as 'he put it in me' and not as Vasquez licking her vagina [as she did at trial], and she claimed that she had taken a shower on the

night of the attack (which contradicts her father's testimony that she fell asleep on the couch with her father)." Id. at 30a.

Petitioner argues that the state court statement that there was no contradiction between the EMS report and the testimony because the "it" referred to in the run sheet could have been Petitioner's tongue and that she could have showered after her father went to sleep. "This post hoc harmonization is not impossible as a matter of logic but does not explain [trial counsel's] indifference to the potential inconsistency (the disharmonious explanation is probably more plausible)." Pet. App B-30a. "He did not try to *find out* whether or not the testimony of [the victim] and her father would stand up to impeachment on the basis of the EMS report. Moreover, [trial counsel] should have identified the report as particularly probative because it was made so close to the original report of the attack, so its inconsistency would sharply undercut the corroborative testimony based on interviews with A.L. that took place much later." Id. Penetration and licking are much different and this important inconsistency should have been "recognized as premium impeachment evidence." Pet. App B-30a. The Sixth Circuit also claimed that the run sheet should have led to trial counsel's interviewing the EMS responders. Id. "They have been in a position to testify as to A.L.'s demeanor in the ambulance on the way to her exam, possibly corroborating Becky Shaffer's testimony that A.L. was at ease in the ambulance and more concerned with the attention she was receiving than disturbed by the abuse she reported." Id.

Dismissing the contention that the failure to do any investigating was trial strategy, the Sixth Circuit stated that "that decision was 'objectively unreasonable because it was a decision made without undertaking a full investigation' and therefore not due deference. Parrish Towns v. Smith, 395 F.3d 251, 259 (6th Cir. 2005) (internal quotations omitted); see also Workman v. Tate, 957 F.2d 1339, 1345 (6th Cir. 1990) ('Where counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe they would not be valuable in securing defendant's release, counsel's inaction constitutes negligence, not trial strategy.')" Pet. App B-31a. In fact, the only pretrial work offered by trial counsel was some minimal legal research on these types of cases in general. Id. This

> should have pointed him toward the investigation he failed to undertake. It is well known in the literature (and the cases cited above) that the credibility of the child witness is often central to the success of child sex abuse prosecutions and that the circumstances surrounding the initial accusation of the abuse are important indicia of credibility. This suggests that, even without knowing what [trial counsel] knew about the available evidence, Becky Shaffer and the EMS run-sheet would be natural starting points to an investigation and a defense. Yet, Vasquez's attorney did not pursue these leads. We do not believe that this behavior can accurately be described as a "strategic choice". Instead, we hold it to be representation "below an objective standard of reasonableness" and constitutionally deficient."' Pet. App B-31-32a.

Finally, Petitioner seeks to blame, once again, the wholesale failure to investigate or prepare for trial on Respondent. Petition, pp. 23-24. Although this was not addressed by the Sixth Circuit, the failure of Respondent to waive a constitutionally protected right (the right to a speedy trial), especially in the face of being wholly uncertain about his trial counsel with whom he met on three occasions

for a total of 45 minutes, does not excuse trial counsel's failure to prepare for trial in any manner whatsoever.

The Sixth Circuit's final step was to examine whether this deficient performance resulted in prejudice to Respondent. As did the District Court, the Sixth Circuit determined that it did. "[I]n light of centrality of credibility to the prosecution's case and the strength of the missing impeachment evidence[6], Vasquez has demonstrated that but for his counsel's unprofessional errors there was a reasonable probability that his trial would have had a different outcome; our confidence in the verdict is indeed undermined." Pet. App B-37-38a.

Regarding the EMS run sheet, it "demonstrates a specific and non-trivial difference in her story over how the attack took place: the run-sheet implies [she] reported that there was penetration by Vasquez's penis in contradiction to the evidence at trial." Pet. App B-32a. This is a substantially prejudicial error and cannot be discounted by Petitioner's claim that the tongue was it. Petition at 26. The Sixth Circuit specifically addressed this concern:

> Coupled with the inconsistency about the shower, we think it likely a jury would consider the run-sheet evidence of instability in A.L.'s story. This is especially so because it is unlikely that the jury would believe a nine-year-old would colloquially describe Vasquez's licking as "put[ting] it in," whereas she might be likely to use that term for penetration. Moreover, unlike A.L.'s story at trial, penetration is not consistent with the circumstances of the attack occurring in a short

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[6] "In determining whether Vasquez has carried his burden, we must evaluate the deficiency in light of the 'totality of the evidence before the . . . jury.' And so, in a case in which the 'verdict or conclusion [is] only weakly supported by the record is more likely to have been affected by errors . . .' Accordingly, in cases like this one, where the only evidence of the crime or the defendant's guilt is the testimony of the victim, our circuit has been especially willing to find prejudice from deficient representation because '[t]he lack of physical evidence confirming sexual activity meant that this was necessarily a close case at the trial level.'" Pet. App B-32a. (internal cites omitted)

> window of time, with her father's presence upstairs, and on the same bunk-bed where Vasquez's children were sleeping.
> Pet. App B-32-33a, n. 3.

The other failure left to address in terms of prejudice is Becky Shaffer. Mrs. Shaffer testified at the post-conviction hearing. The Sixth Circuit accurately determined that she would have revealed essential inconsistencies in the victim's alleged timeline. Pet. App B-33a. Further, Mrs. Shaffer witnesses the victim's father (a police detective) coaching his daughter and prompting her replies to law enforcement. Pet. App B-30a. She further would have challenged the assertion by Petitioner that the victim was traumatized and not herself. Mrs. Shaffer witnessed the victim acting relaxed and excited about attention and the possibility of being on TV. Id. Of course, this is not indicative of a young girl who recently finally revealed a traumatic experience. Pet. App B-33-34a.

Equally as important, speaking to Mrs. Shaffer would have, as it often does, led Respondent's trial counsel to speak to other potential defense witnesses. Pet. App B-33a. The testimony of Tammy Salopek and her daughter, Ashley Snyder at the post-conviction hearing could have been essential to an acquittal for Respondent. Mrs. Salopek was friends with both the Shaffers and the victim's family. Id. at 10a. She and her daughter were in continuous contact with the victim both before and after the event. Id. "They indicated they would have testified to [the victim's] lack of truthfulness -- specifically her willingness to lie to get attention." Id. Further, the victim's father testified that his daughter was devastated and not herself after she revealed the abuse. Mrs. Salopek and her

daughter would have testified that in the week immediately after the accusation, there was no change in the victim's behavior, even though they had ample opportunity to observe her since she slept at their house that week. Id. Finally, the two could have bolstered Respondent's attempt to discredit the victim and argue that she concocted the story. During the summer of 2000, Ashley Snyder had actually been the victim of sexual molestation and told the victim about it. Id. This testimony, that the victim is not trustworthy and does not understand the consequences of lies, was not acting strange after she revealed the abuse, and had just recently heard of the sexual abuse suffered by Snyder, "challenges the specifics of [the victim's] story, her motivations, and her general truthfulness." Pet. App B-33a. It also "undermines the corroboration evidence presented by the state – that [the victim's] story did not change in her retelling of it, that she acted out of character after the attack, and the implausibility of a nine-year old making up such a sexual-molestation story." Pet. App B-33-34a.

Petitioner argues that it was safe to assume that Mrs. Shaffer would not have been cooperative because of the conversation with Mrs. Kitchen and because Mrs. Shaffer did not want to make a written statement to the police, even though she had already made a verbal one. These facts are completely irrelevant to the duty trial counsel owed to at least investigate her, speak to her. As noted above, the fact that her husband was a state witness or that her mother said the family may not be willing to help tells trial counsel nothing about her willingness to cooperate to help the husband of her sister. Further, her desire to refrain from making a written

statement is also immaterial because, in addition to the fact that she actually spoke to the police, she also may have responded differently to certain, direct questions asked by trial counsel with a different agenda and perspective than the police. There is just no evidence to support these assertions. Her testimony at the post-conviction hearing would undoubtedly have had an effect on the jury.

With regard to Mrs. Salopek and her daughter, Petitioner only argues that the evidence regarding the daughter's previous molestation was inadmissible in the post-conviction hearing because Respondent failed to provide a proper foundation. The Sixth Circuit failed to address this fact. Petitioner argues that this evidence should not have been considered by the Sixth Circuit because of the trial court's determination that it could not consider it. Petition at 20. The Sixth Circuit, however, was free to consider it because it had already found the trial court's factual determination regarding this evidence f awed.

Moreover, the Sixth Circuit found that the evidence at issue was not cumulative as to the narrow admissions trial counsel was able to elicit at trial. Without any factual basis for cross-examining, he was only able to draw out that the victim had some issues with telling the truth, just as every kid did. The evidence presented at the post-conviction hearing went far beyond this innocent generality and provided concrete and compelling evidence that the victim was fabricating the story. "The evidence provides direct and specific challenges to her motivations (she wants to be on TV, she wants attention), her trustworthiness (she lies a lot and her friends and friends' parents confirm that she does not understand

consequences of her lies), the stability of her story (the change in the EMS report, the prompting from her father), and the origins of her story (she just recently learned Ashley Snyder had been molested), each of which was not presented to the jury via Butler's cross-examinations." Pet. App B-36a. The missing evidence "undermine[s] confidence in the outcome." Strickland, 466 U.S. at 6.

Conclusion

For the above stated reasons, Respondent Vasquez requests the Court deny Petitioner Warden's Petition for *Certiorari*. The Warden's Ppetition misrepresents the scope and analysis of the Sixth Circuit's decisions and opinions, as well as the facts of the underlying case. The Sixth Circuit's decisions create no conflict of law, will in no way create any sort of confusion in this Court's jurisprudence, nor does Petitioner provide any other reason to warrant revisiting these well and clearly-established areas of the law.

Therefore, Petitioner Warden's Petition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

KEITH SMITH, Warden,

Petitioner,

v.

ROBERT S. VASQUEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent Robert Vasquez's brief in opposition makes two primary arguments. First, Vasquez claims that the Sixth Circuit properly reviewed his claim de novo under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1214, because the state appeals court applied the wrong ineffective-assistance standard, even though the state court correctly explained the standard elsewhere in its opinion. Second, he maintains that the Sixth Circuit, applying the right legal standard, properly determined that his trial counsel was ineffective. Vasquez is wrong on both counts. This Court should either summarily reverse or grant review of the Sixth Circuit's decision to ensure that federal courts adhere to AEDPA's limitations on habeas review.

REASONS FOR GRANTING THE WRIT

A. The Sixth Circuit exceeded its limited AEDPA powers in finding that the state appeals court decision was contrary to law.

To prevail on his claim of ineffective assistance of counsel, Vasquez must demonstrate both deficiency and prejudice—that is, (1) that his counsel's performance fell below an objective standard of reasonable competence, and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a

breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

The Sixth Circuit made two critical mistakes when it reversed the Ohio appeals court's conclusion that Vasquez's counsel was not ineffective. First, the Sixth Circuit afforded no deference to the state court's analysis of the deficiency prong even though the state court at all times correctly recited and applied the law on that prong. Second, the federal court disregarded this Court's on-point holdings regarding the use of shorthand in restating legal standards, and improperly subjected the state court's conclusions on the prejudice prong to de novo review. Vasquez is not able to rebut these core points.

1. The Sixth Circuit failed to defer to the Ohio appeals court's examination of the first prong of the *Strickland* analysis.

Whatever may be said of the Ohio appeals court's analysis on the *prejudice* prong, the state court correctly identified and applied *Strickland*'s *deficiency* standard. App. 134a. Indeed, the Sixth Circuit found no error in the state court's deficiency evaluation. At the very least, then, the Sixth Circuit owed deference to the Ohio appeals court's deficiency analysis.

The Fourth Circuit's decision in *Moody v. Polk*, 408 F.3d 141, 146–47 (4th Cir. 2005), reaches exactly this conclusion. The *Moody* court held that, where a state court correctly applies *Strickland*'s deficiency prong but errs in its prejudice analysis, AEDPA deference still applies to the first half of the analysis.

Id.; see also *Gray v. Branker*, 529 F.3d 220, 228–38 (4th Cir. 2008).

Vasquez's only response on this point is that the Sixth Circuit gave "considerable deference to the state courts' findings" regarding deficiency but nonetheless "clearly determined that [trial counsel's performance] fell below any constitutionally permissive standard." Opp. at 22. But the Sixth Circuit nowhere suggested that it was affording AEDPA deference to the Ohio court's deficiency analysis, nor did the federal court explain how, if at all, the Ohio court unreasonably applied *Strickland*'s deficiency prong.

Because an individual must satisfy both the deficiency and prejudice prongs to demonstrate ineffective assistance, the Sixth Circuit erred in granting Vasquez relief at all, regardless of its conclusions on the prejudice prong. See *Strickland*, 466 U.S. at 697; *Moody*, 408 F.3d at 152. The Sixth Circuit's decision therefore warrants reversal on this ground alone.

2. State courts do not act contrary to federal law when they use imprecise shorthand in restating legal standards.

The Sixth Circuit only compounded its errors when it turned to the prejudice prong. As noted in the Petition, the Sixth Circuit paid short shrift to two on-point authorities from this Court. Pet. at 13–14 (citing *Woodford v. Visciotti*, 537 U.S. 19, 22–24 (2002) (per curiam); *Holland v. Jackson*, 542 U.S. 649, 654–55 (2004) (per curiam)). *Visciotti* and *Jackson* stand for the rule that state courts do not

act contrary to law simply because they use imprecise shorthand to restate a legal standard that is explained correctly elsewhere in the opinion. *Id.* By faulting the state appeals court for engaging in the exact same conduct, the Sixth Circuit ran afoul of this Court's holdings and exceeded its limited habeas authority.

Vasquez attempts to distinguish *Visciotti* and *Jackson* in several respects, but each of his arguments fails under scrutiny.

First, in discussing the purported analytical errors below, Vasquez focuses on the wrong state court opinion. On AEDPA review, federal courts examine only the last reasoned state court decision on the issue. See *Payne v. Bell*, 418 F.3d 644, 660–61 (6th Cir. 2005); *Schultz v. Page*, 313 F.3d 1010, 1015 (7th Cir. 2002). Here that decision is the Ohio appeals court's opinion. App. 129a. Yet Vasquez, like the Sixth Circuit, persists in citing to the trial court's discussion of the issue as well. Opp. at 14–15; App. 15a. These improper citations exceed the scope of AEDPA review.

Second, Vasquez leans heavily on the fact that, after correctly reciting the prejudice test—whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694—the Ohio trial and appeals courts stated that Vasquez failed to show that "the outcome of his trial would have been different" and that none of his proposed witnesses "would have changed the outcome of his trial." Opp. at 15. He claims that these restatements varied so significantly from the

proper standard that the courts actually applied a different rule. Opp. at 18–21.

In making this argument, Vasquez tries to wall off *Visciotti* and *Jackson*, where only the word "reasonable" was omitted in the restatements of the "reasonable probability" prejudice standard. *Visciotti*, 537 U.S. at 22–24; *Jackson*, 542 U.S. at 654–55. He suggests that these cases illustrate specific instances of "permissible shorthand" in describing the prejudice prong, Opp. at 18, but that state court decisions using other formulations should not receive the same benefit of the doubt.

The Court's opinions do not support that crabbed reading. On the contrary, in both cases the Court explained that shorthand references must be read in context. If the state court decision, taken as a whole, reflects a proper understanding of the applicable standard, then stray uses of imprecise shorthand will not support federal-court invalidation. *Visciotti*, 537 U.S. at 23–24; *Jackson*, 542 U.S. at 655. The Court specifically admonished federal courts not to construe imprecise language in selective isolation, especially when "such a reading would needlessly create internal inconsistency in the opinion." *Jackson*, 542 U.S. at 654–55.

The Sixth Circuit made precisely this error: It viewed the Ohio appeals court's language in isolation and thereby created needless inconsistency in the court's opinion. The state court demonstrated that it understood the correct standard by citing it in full in the opinion. App. 134a. The shorthand language appears just a few pages later, App. 141a, with only a verbatim recitation of the trial court's factual

findings separating the two references, App. 135a–140a.

In the same vein, Vasquez argues that the state appeals court's language mimics a standard the Court said would be contrary to law in *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). Opp. at 20–21. But that comparison is apt only if the Ohio court's language is improperly taken in isolation. The state court's opinion as a whole demonstrates that the court knew and applied the correct standard.

That is not to say that a state opinion that once recites the correct standard will never be contrary to law. State courts of course may not insulate their decisions from collateral review by incanting magic words and then disregarding the correct standard.

But the Ohio court did not pay mere lip service to the proper *Strickland* prejudice standard; it also correctly applied that standard. After reciting the right rule, the state court reviewed in depth all of the factual findings from the post-conviction hearing. App. 134a–140a. The court noted that Vasquez presented several post-conviction witnesses who did not testify at trial. App. 141a. But the court explained that the simple fact that the witnesses were not called at trial does not establish prejudice; rather, the new evidence must cast some doubt on the outcome of the trial. *Id.* And the state court emphasized that Vasquez offered *no* substantive evidence to support his claim of innocence. *Id.*

Thus, the state court's conclusion—that Vasquez failed to cast any doubt on his conviction—is fully consistent with the *Strickland* standard of "a

probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Ohio court's opinion therefore should receive AEDPA deference.

Finally, Vasquez submits that run-of-the-mill ineffective-assistance cases fail to meet the standard for certiorari. Opp. at 24–25. But at the very least the Sixth Circuit has created a conflict with the Fourth Circuit's opinions in *Moody* and *Gray* that justifies this Court's review. More to the point, the opinion below runs directly contrary to *Visciotti* and *Jackson* and therefore warrants summary reversal.

B. The state appeals court reasonably concluded that Vasquez did not receive ineffective assistance of counsel.

The Sixth Circuit's decision perfectly illustrates the folly of failing to afford AEDPA deference. Even as it acknowledged the difficulty of engaging in de novo review of state proceedings based on a cold record, App. 21a, the Sixth Circuit proceeded to do so in an opinion that is distorted by hindsight and rife with second-guessing. Cf. *Strickland*, 466 U.S. at 689. Among other things, the Sixth Circuit's ineffective-assistance analysis overstates the importance of marginal witnesses and reads documentary evidence out of context. See Pet. 18–29.

Vasquez defends the decision by parroting the Sixth Circuit's conclusions that his counsel was ineffective for not investigating and introducing the evidence presented at Vasquez's post-conviction hearing. These claims do not survive scrutiny.

Both Vasquez and the Sixth Circuit label counsel deficient for failing to conduct a "reasonable investigation" in the case because he: (1) failed to speak to one witness (Becky Shaffer, Vasquez's sister-in-law), who would have led him to discover others (Tammy Salopek and Ashley Snyder); and (2) failed to follow up on perceived inconsistencies between the victim's (A.L.'s) account of the attack and notations on an emergency services (EMS) run sheet filled out weeks after the attack. Opp. 27–34; App. 24a–32a. Reviewing courts must examine the reasonableness of these decisions "from counsel's perspective at the time" and "apply[] a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690, 691. And all of counsel's actions must be evaluated in view of the fact that Vasquez chose not to waive his speedy trial rights, which gave counsel a limited period of time to conduct a complex examination. Sixth Circuit Joint Appendix ["J.A."] at 1356–58. Vasquez's strategic choice limited counsel's preparation time, and he must accept the consequences of that decision. See *Strickland*, 466 U.S. at 690–91.

Given these constraints, Vasquez's counsel made reasonable judgment calls about what actions would bear the most fruit at trial. The primary witness at issue, Becky Shaffer, had no direct information regarding the attack—she was asleep when it occurred. App. 165a. Thus, counsel could reasonably determine that she was not essential to his client's case. And both counsel and Vasquez attempted to get Vasquez's family (which included Shaffer) to cooperate, only to be rebuffed at each turn. App. 175a; J.A. 1371–72. Indeed, Vasquez

himself believed that his family had abandoned him. J.A. 1371–72.

Counsel can hardly be faulted for choosing not to spend more of his limited time chasing leads that appeared unlikely to yield useful information. And while Shaffer stated at the post-conviction hearing that she might have testified if counsel had pressed her to do so, counsel's actions are judged based on the information he had at the time, not in view of the full range of knowledge available later. See *Strickland*, 466 U.S. at 689.

Vasquez also faults counsel for failing to investigate more thoroughly an EMS run sheet containing the notation "pt. st. he put it in her." Vasquez argues that the statement exposes an inconsistency in A.L.'s story that Vasquez performed oral sex on her. Opp. 31–32; App. 29a–30a. But this objection stems from the Sixth Circuit's unsupported assumption that the ambiguous word "it" referred to Vasquez's penis. A.L. consistently alleged only that oral sex occurred, and the record supports the conclusion that A.L. used "it" to refer to Vasquez's tongue. See App. 158a–159a (A.L. testified that Vasquez touched both inside and outside her vagina with his tongue); J.A. 1138.

In any event, neither the omitted witnesses nor the EMS run sheet demonstrates prejudice. Vasquez claims that Shaffer would have highlighted various inconsistencies in the timeline of the attack, that A.L.'s father coached her to give certain information, and that A.L. was relaxed and excited by the attention she was receiving when she went to the hospital after reporting the attack. Opp. at 35. But the benefit of Shaffer's testimony would have

been limited. Shaffer admitted, for instance, that A.L. was relaxed because the emergency personnel were joking to make her comfortable. App. 165a–166a. And the marginal benefits of Shaffer's testimony would have been outweighed by its substantial downside: Specifically, Shaffer would have admitted that she took her own son to the hospital to determine whether Vasquez had sexually abused him. App. 166a.

Likewise, Vasquez claims that Salopek and Snyder could have testified that A.L. was relaxed weeks after the attack and that she often lied to get attention. Opp. at 35–36. But A.L. admitted as much in her own trial testimony. J.A. 665–66. The omission of cumulative evidence cannot demonstrate prejudice. See *Wong v. Belmontes*, 130 S. Ct. 383, 388–94 (2009). And although Vasquez claims that Snyder could have testified that A.L. may have gained some knowledge of sexual activities when she heard that Snyder was molested, Opp. at 36, Snyder said she was not even certain she told A.L. that information: "I talked to [A.L.'s] sister about it and I think [A.L.] was present. I am not sure, though." J.A. 1175.

Finally, Vasquez claims that the EMS run sheet shows that A.L. changed her story from oral sex to vaginal sex. Opp. at 34. But again, that is only true if the run sheet notation is divorced from the record.

Thus, the state appeals court did not commit any error in rejecting Vasquez's ineffective assistance claim, let alone unreasonable error under AEDPA. The Court should reverse the Sixth Circuit's contrary decision.

CONCLUSION

For the above reasons, the Court should grant the State's petition and reverse the Sixth Circuit's decision.

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